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I
Introduction

Entertainment law[1] has become an increasingly popular area of legal practice in recent years.[2] Many factors account for this popularity. First, there has been remarkable growth and change during the last twenty years within the music[3] and entertainment[4] industries. Second, the entertainment industry has been recognized as a legitimate and increasingly complex commercial industry[5] which has created a greater need for legal expertise.[6] Third, entertainment law is seen as a lucrative

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1. The term "entertainment law," as used in this commentary, refers to the practice of law in all fields of entertainment and the various industries connected therewith, including the music, motion picture, radio and television industries. Where indicated the sports industry will also be included.

2. This can be seen from the apparent rise in the number of law firms initiating entertainment departments, the demand in law schools to add courses on entertainment law, and the influx of written materials on the subject.

3. S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC XIX (2d ed. 1977). "The growth of the music industry in the past twenty years has in much of that period far outstripped the increase in the gross national product of the country as a whole."

4. Jossen, *Fiduciary Aspects of the Personal Manager's Relationship with a Performing Artist*, 11 PERF. ARTS REV. 108, 108 (1981).

5. T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW § 1.01 (1983). "Entertainment is a commercial industry with intellectual property as its base." The general view is that the entertainment industry has only recently become a legitimate commercial venture, although book publishing and movie production have existed far beyond recent history. Lecture by Neil Boorstyn, Adjunct Professor and Practitioner, Hastings College of the Law, San Francisco (Jan. 11, 1985).

6. Halloran, *Music Attorneys*, in THE MUSICIANS MANUAL: A PRACTICAL CAREER GUIDE 126 (M. Halloran ed. 1979).

> Most attorneys, like most doctors, specialize in particular fields of practice. As with doctors, the primary reason for specialization is the complexity of the problems that confront the professional. The law is far too complex for a lawyer to have adequate competence in all legal areas. A specialist, at least

business endeavor where often a mere phone call can consummate a million dollar deal.[7] Fourth, many attorneys are frustrated artists who, knowing of the difficulty of entry into the entertainment world, have sidestepped into the business side of the entertainment field rather than sacrifice their creative interests entirely.[8]

The effect of these developments has been pronounced. The popularity of entertainment law has inevitably led many entertainment attorneys to enter into non-legal activities and to perform roles beyond traditional legal representation. It is no longer a rarity to find an entertainment attorney who has a related secondary occupation.[9] This should come as no surprise when one considers the number of attorneys entering the market, and the increased focus within law firms on client development.[10] Thus, both social and economic constraints seem to be pushing attorneys into the business side of the entertainment world.

The basic nature of the legal practice is also changing. Entertainment attorneys are offering more than the traditional legal services to their artist clients. Artists[11] no longer use an attorney solely to draft or approve contracts; athletes now use

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in theory, can do a better job for his client because of his acquired experience in a particular area. In recent years, due to the growth and complexity of the entertainment field, a new specialty has arisen among lawyers — *"entertainment" lawyers.*

Id. (emphasis added).

7. Perhaps the best evidence of this is the "inordinate amount of time entertainment attorneys spend on the phone." Interview with Bruce Rosenblum, Associate of Dern, Mason & Floum, Los Angeles (Nov. 1, 1984).

8. This suggestion is evidenced by the many attorneys heading studios, working for talent agencies, managing artists, negotiating contracts, etc. Griesbaum, *Entertainment and Legal Forum*, 1 NITE LIFE REVUE at 3 (1979).

9. *See infra* notes 35-49 and accompanying text (examples of dual occupations).

10. Client development is often referred to as "rainmaking," a term used to mean creating business and bringing new clients to the firm. The fact that firms have recognized the need for firm members to perform this function seems to reflect the view within the legal community, both academic and practicing, that a transition is taking place from the attorney as "professional" to the attorney as "businessman."

11. The terms "artist(s)" and "entertainer(s)" are used interchangeably in this commentary. The Talent Agent Act defines "artists" as:

> [A]ctors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.

CAL. LAB. CODE § 1700.4 (West Supp. 1983).

attorneys to negotiate multi-million dollar contracts,[12] and novice musicians send tapes of their work to known music attorneys, hoping they will listen to the music and recommend it to a recording studio.[13] Attorneys may even attend concerts looking for new groups that need representation.[14] Artists may even fire their agents and personal managers, only to replace them with attorneys and business managers.

Faced with an increased demand for services outside the traditional legal role and various market pressures, it is not surprising that many attorneys have entered into secondary occupations within the entertainment industry.[15] However, with these changes also come problems. This trend and the nature of entertainment law raise questions as to how entertainment attorneys differ from other practitioners and the extent to which they should be regulated in their dual or multiple occupations. For example, if an attorney handles other non-legal business matters for an entertainer, has he entered into a dual occupation? How do statutes, administrative regulations, industry regulations and trade standards affect the practice of entertainment law? May the attorney ethically participate in the many economic and artistic endeavors to which he may be exposed? What happens to the traditional attorney-client relationship once an attorney expands his representation to include involvement in his client's business transactions?

Bar Association Rules and Codes[16] already dictate an attor-

12. Leigh Steinberg, attorney-athletic agent, currently has more than 50 football players as clients and, since June, 1983, six Steinberg sports clients have signed contracts negotiated by Steinberg worth a total of $57 million. Caroll, *Agent to the Stars of Field and Tube*, S. F. Chron., Jan. 9, 1985, at 21, col. 1.

13. LEGAL ASPECTS OF THE MUSIC INDUSTRY, ABA FORUM COMMITTEE ON THE ENTERTAINMENT AND SPORTS INDUSTRIES (Nov. 12, 1983) (address by Jay Cooper, Senior Partner of Cooper, Epstein & Hurewitz, Beverly Hills).

14. Panel Discussion; *Personal Representation in the Entertainment and Sports Industries*, COMM/ENT SYMPOSIUM ON ENTERTAINMENT LAW (Jan. 26, 1985) (Lionel Sobel, Associate Professor Loyola School of Law, Los Angeles).

15. Jossen, *supra* note 4, at 117. "It is not uncommon today to find attorneys shifting from private practice to an executive position in the entertainment industry and vice-versa. In fact, attorneys often give up the practice of law to become writers, producers, directors, theatrical or literary agents or personal managers." *Id. See* Griesbaum, Entertainment and Legal Forum, 1 NITE LIFE REVUE at 3 (1979); *see also* Mendelsohn, *Attorneys: Life in the Rock World*, L. A. Times, Nov. 11, 1979 (Calendar) at 90, col. 3.

16. *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT (1983), [hereinafter MODEL RULES], the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1986) [hereinafter CODE]. Additionally, there are various state professional responsibility codes and rules which will be referred to in formal and informal opinions. *See infra* note 81.

ney's behavior with respect to legal counseling, and include rules concerning confidentiality, solicitation, fiduciary duty, and conflict of interest. State law and union regulations regulate the practices of talent agents.[17] This commentary examines the duties, regulations and forces that affect an attorney who "crosses the line" and performs the dual role of legal advisor and personal business advisor to an artist. Section two discusses the nature of the entertainment industry and describes the specific secondary occupations of the talent agent and the personal manager. Section three addresses the limitations placed on attorney-agents and attorney-managers. It focuses on the parameters set by the American Bar Association, particularly with respect to the extent to which an attorney can conduct a secondary occupation. Section four examines the state statutes, union guidelines and trade standards that regulate the secondary occupations of talent agents or personal managers. Finally, section five concludes that the performance of multiple roles may be beneficial to entertainers and suggests solutions to ensure that such roles are performed harmoniously. It also advocates needed changes in the present rules governing the attorney-agent or attorney-manager.

II
Attorney-Managers and Attorney-Agents

Attorneys are an integral part of the entertainment industry. They aid the artist in protecting his art, and advance the interests of recording companies, motion picture studios and the numerous other business entities. Attorneys, together with talent agents and personal managers, act as liaisons between artists and businesses. This section will argue that many of the services attorneys provide overlap with the services provided by agents and managers. When the overlap reaches the point that an attorney can be considered to have acquired a secondary occupation the numerous constraints described in section three this note limit the dual-occupation attorney.[18]

17. *E.g.*, CAL. LAB. CODE §§ 1700-47 (West 1971 and Supp. 1986). Although the laws do not expressly regulate the behavior of personal managers, they do inferentially regulate their conduct. *See infra* text accompanying notes 152-251.

18. *See infra* notes 70-151 and accompanying text.

A. The Role of Personal Representatives in the Entertainment Industry

The entertainment industry, like any other transactional business, is comprised of profit-seeking companies. However, in practice, the entertainment world has its own unique customs and procedures for transacting business.[19] It embodies an extremely diverse cast of characters who are generally in tough competition for artists, artistic product, and money. While artists create the product, the rest of the industry hopes to turn the product into a financial gain. This note focuses primarily on those persons involved in the personal representation[20] of an artist.

Because the entertainment industry is as much a business as it is a forum for communication, the professional artist generally needs to utilize the services of specialists and professionals,[21] including personal managers,[22] talent agents,[23] business managers,[24] and attorneys.[25] The successful artist will usually have a number of these specialized "middlemen" to aid him in marketing and protecting his art or talent.

Traditionally, each of these specialists has served a different facet of the artist's career. Today, however, the imperatives of the business have caused many specialists to expand their services to cover several facets of an artist's career. First, artists may find it less costly and more expedient to have fewer middlemen to perform the needed services.[26] Second, the current

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19. *See* T. SELZ & M. SIMENSKY, *supra* note 5 at 1-1 (discussion of the entertainment industry's similarities and differences to other commercial industries); *see also* Simensky, *Defining Entertainment Law*, 4 ENT. & SPORTS LAW. 3, 13 (1986).

20. The phrase "personal representative" used herein encompasses professional and business representatives in the entertainment and sports industries.

21. Johnson, *The Business Side of the Artist's Career*, in THE MUSICIAN'S MANUAL: A PRACTICAL CAREER GUIDE 78 (M. Halloran ed. 1979); *see also* Gershon, *Counseling Entertainers*, in COUNSELING CLIENTS IN THE PERFORMING ARTS 9 (1975).

> The performing artist, sports figure, or entertainer generally has a large number of people in his retinue who render advice, guidance and counsel, and they almost always have at least an agent and/or general manager. The underlying purpose of these various relationships is to allow and help an artist to perform, create and pursue whatever his profession is and enable him to accomplish the fullest commercial and artistic development of his career.

Id. at 16.

22. *See infra* notes 30-42 and accompanying text.

23. *See infra* notes 43-52 and accompanying text.

24. *See infra* notes 53-54 and accompanying text.

25. *See infra* notes 55-61 and accompanying text.

26. *See infra* notes 238-39 and accompanying text.

complexity of the entertainment business requires greater skills from each representative, which, once acquired, give a representative the ability to offer a greater range of services.[27] Third, due to the concentration of the entertainment business within two geographic areas (New York City and Los Angeles), a representative with many contacts may find his services in high demand in many capacities and for several different clients. Fourth, a new artist, fortunate enough to obtain one kind of representation, may be unable to procure separate representation in all areas.[28] Finally, where personal representatives continue to separate their duties and responsibilities, there may be gray areas where an artist's problems overlap.[29] To better understand the potential for overlap and the trend toward centralization of representation, it is helpful to examine the various services performed by personal representatives.

1. *The Personal Manager*

The first specialist with whom an artist generally comes in contact is the personal manager. The relationship between artist and personal manager often begins before the artist has achieved formal public recognition.[30] The personal manager advises, counsels, and directs the entertainer in the develop-

27. *Questions and Answers About Agents, Managers and Lawyers from the Symposium Transcripts*, in THE ACTOR'S MANUAL: A PRACTICAL CAREER GUIDE 48 (1978) [hereinafter *Questions and Answers*].

28. *See id.* at 47. "Talent agencies, particularly the larger ones, have a huge client list. The lesser names tend to hover at the bottom of the list. They do not produce enough revenue for the agency and the agents are too busy with their name clients." *Id.* (Statement by Howard West). *See generally* Note, *The Personal Manager in California: Riding the Horns of the Licensing Dilemma*, 1 COMM/ENT L.J. 347 (1978); *Licensing & Regulation of Artist Managers, Personal Managers and Musicians Booking Agencies: Hearings Before the California Legislature Senate Committee on Industrial Relations* (1975) [hereinafter *Hearings*].

29. For example, both a business manager (possibly an accountant) handling financial investments and a tax attorney may be able to make suggestions for the best tax incentives for a contract. *See generally* Levy & Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?* 52 A.B.A. J. 1110 (1966). Also, a personal manager may perform some of the functions traditionally associated with talent agents; for example, talent agencies and personal managers both "advise and counsel an artist in the development of their professional careers." CAL. LAB. CODE § 1700.4 (West Supp. 1986). In general, "[t]he functions that each of the professions (agent, manager, lawyer, accountant) perform overlap to some extent and are being performed sometimes in combination by one person . . . .It's hard to keep the functions completely distinct . . . ." *Questions and Answers, supra* note 27, at 48 (statement by Eric Weissman).

30. Note, *supra* note 28, at 347; *see also* Hearings, *supra* note 28, at 40 ("[Agencies] very often do not sign [artists] until they have a record . . . . Personal managers . . . are

ment, advancement, and enhancement of his artistic career.[31] Thus, the personal manager runs the artist's personal affairs (and sometimes business affairs), while the entertainer concentrates on his art.[32] The personal manager usually educates his client about the general practices of the entertainment industry and helps the client select other persons who can provide additional advice and help procure employment.[33] If the artist does not have a separate road manager or business manager, tasks such as making travel arrangements, hiring extra personnel, and handling expenses may be performed by the personal manager.[34] Ultimately, the personal manager acts as the artist's alter ego. He essentially coordinates the activities of the artist with those persons who function in various areas for, and on behalf of, the artist, such as talent agents, business managers, public relations personnel, accountants and attorneys.[35]

Neither formal training nor licensing is required to become a personal manager. In the recording industry, at least in the initial stages of an artist's career, the personal manager may be a friend who is willing to invest the time and money to help the artist get a recording contract.[36] A personal manager may be an

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in the business of developing talent from its . . . genesis." (statement by Roger Davis of the William Morris Agency, Los Angeles).

31. *See, e.g.*, Johnson, *supra* note 21, at 78; Thaler & Joseph, *Personal Managers — Their Legal Status and Problems* 1, in CURRENT LEGAL TRENDS AND DEVELOPMENTS IN THE ENTERTAINMENT AND SPORTS INDUSTRIES, ABA FORUM COMM. ON ENTERTAINMENT AND SPORTS INDUSTRIES (D. Lange ed. 1979) (materials from symposium, Mar. 9-10, 1979).

32. *Questions and Answers, supra* note 27, at 48. "The personal manager babysits . . . .[T]he artist may depend on the manager for emotional support and for the resolution of conflicts." *Hearings, supra* note 28, at 159 (statement by Joe Smith, President, Warner Brothers Record Co.). *See also* Note, *The Plight of the Personal Manager in California: A Legislative Solution*, 6 COMM/ENT L.J. 837, 837 (1984).

33. Note, *supra* note 32, at 837.

34. *Hearings, supra* note 28, at 171, 172 (statement by Arnold Mills, President, Conference of Personal Managers West).

35. Thaler & Joseph, *supra* note 31, at 1. The personal manager's role was not as great during the origins of the entertainment industry. However, "[t]he complexity of the business aspects accompanying this growth has created a need for a liaison between the performing artist and the attorneys, accountants, agents and promoters with whom the artist would otherwise have to deal directly." Jossen, *supra* note 4, at 108-09.

36. Note, *supra* note 28, at 347. The personal manager's role in the theatrical industry may not begin until the actor's career is more established. Although the personal manager will still act as chief coordinator of the business manager, attorney, publicist and agent, his role in career development is minute compared to that of a personal manager in the recording industry. *See Questions and Answers, supra* note 27, at 43.

attorney, accountant or other business person[37] who uses his contacts, experience, and knowledge to develop an artist's career.[38] A personal manager may also be engaged in music publishing, record production, house booking, and various other business activities throughout the entertainment industry.[39] Although there are no formal prerequisites, a successful personal manager must have a thorough understanding of the structure and intricacies of the entire spectrum of the entertainment industry.[40]

At present, there is no direct statutory regulation of personal managers; instead the limitations arise inferentially from legislative and union regulations governing talent agents.[41] For example, a personal manager may neither solicit nor procure employment for the artist unless he is also a licensed talent agent.[42]

2. *The Talent Agent*[43]

A talent agency is a "person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers."[44] To be a "talent

37. Reed, *Personal Managers*, in THE MUSICIAN'S MANUAL: A PRACTICAL CAREER GUIDE 82, 83 (M. Halloran ed. 1979).

38. *Hearings, supra* note 28, at 137. A personal manager may have as few as two to five clients. (statement by Walter L.M. Lorimer, Attorney, Loeb & Loeb, Los Angeles; representing Independent Personal Managers).

39. *Hearings, supra* note 28, at 149-50 (statement by Howard L. Thaler, Legal Counsel, Conference of Personal Managers).

40. Reed, *supra* note 37, at 83.

41. *See infra* notes 163-213 and accompanying text.

42. Numerous articles, cases, and commentary in recent years have focused on a personal manager's proscription from procuring engagements for an artist. *See, e.g.*, Buchwald v. Superior Court, 254 Cal. App. 2d 347, 62 Cal. Rptr. 364 (1967); Johnson & Lang, *The Personal Manager in the California Entertainment Industry*, 52 SO. CAL. L. REV. 375 (1979); Note, *supra* note 28; Note, *supra* note 32; *Hearings, supra* note 28.

The degree and type of prohibition is treated differently in California or New York. In California the issue remains unresolved. *See infra* notes 163-93 (California) and notes 194-201 (New York).

43. The term "talent agent" as used herein includes agents, entertainment agents, theatrical booking agents, artists managers, etc.

44. CAL. LAB. CODE § 1700.4(a) (West Supp. 1986) (This definition excludes the recording contract incidental exemption active from 1983-1986); N.Y. ARTS & CULT. AFF. LAW § 37.01(3) (McKinney 1983). The talent agent equivalent in New York is defined as: "Theatrical employment agency" means any person who procures or attempts to procure employment or engagements for circus, vaudeville, the variety field, the legitimate theater, motion pictures, radio, television, phonograph recordings,

agent," an individual must be licensed,[45] and must agree to follow the entertainment union's franchising rules with respect to terms of contracts, fees, and length of service.[46]

Although the duties of a personal manager and a talent agent overlap to some extent, the primary duty of a talent agent is to obtain employment for the artist he represents.[47] Unlike the personal manager who generally works independently for his artist-clients, a talent agent usually practices within the confines of a large or medium-sized agency.

The advent of the large agency[48] has resulted in both benefits and liabilities for the artist. On the one hand, many of the big agencies are departmentalized, thereby permitting agents to specialize in a particular field such as motion picture, legitimate theatre, appearances, television, independent studios, game and panel shows, recording companies, or concert touring.[49] The big agency can help the artist who has a specific area of interest or expertise because the artist's agent will be a specialist with particularized contacts and resources most suited to the artist's particular needs. On the other hand, the client may get "lost in the shuffle."[50] The talent agent's attention to day-to-day career demands and problems of clients may be minimal.[51] In addi-

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transcriptions, opera, concert, ballet, modeling, or other entertainments, or exhibitions, or performances. . . ." *Id.*

45. *See infra* notes 163-201 and accompanying text.

46. *See infra* notes 202-13 and accompanying text.

47. Johnson, *supra* note 21, at 80. The degree of duplication will vary according to the needs of the artist. "The agent is a business finder and negotiator, whether as a booking agent for concert halls or college circuit tours . . . or as a general marketer of individual or a packaged talent, such as . . . International Creative Management or the William Morris Agency, Inc." S. SHEMEL & M. KRASILOVSKY, *supra* note 3, at 71. "If the talent agent did for each act what a personal manager does, he would not have time to get his work done" because "[at] least 85% of the talent agent's time is spent searching for employment." Johnson & Lang, *supra* note 42, at 378 n.19. *See also Questions and Answers, supra* note 27, at 43.

48. The two biggest agencies are International Creative Management ("ICM") with approximately 2,300 clients and offices in New York, Los Angeles, Las Vegas, Miami, London, and Paris, and The William Morris Agency, Inc. with approximately 2,500 clients with offices in New York, Beverly Hills, Chicago, Nashville, London, Rome, Munich, and Paris. For a discussion of the historical development of talent agencies, see Johnson & Lang, *supra* note 42, at 376-80.

49. 3 A. LINDEY, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS; AGREEMENTS AND THE LAW 1737-38 (2d ed. 1982); *Questions and Answers, supra* note 27, at 43.

50. When this happens the personal manager will have the responsibility "to coordinate the various agents and see to it that his client is receiving proper coverage in the marketplace . . . ." *Questions and Answers, supra* note 27, at 48.

51. Johnson & Lang, *supra* note 42, at 378.

tion, a young artist may be unable to find an agent willing to work for him because the artist is not yet able to meet the "norms of profitability."[52]

3. *The Business Manager*

Business managers collect and disburse funds, perform routine bookkeeping and accounting functions, manage investments and keep a close watch over the tax consequences of an artist's business affairs.[53] Usually, business managers are accountants and lawyers,[54] and as such are regulated by the professional associations governing those occupations. The personal manager will often perform business management functions for an artist until the artist is able to afford the costs of an additional personal representative.

4. *The Entertainment Attorney*

The role of an entertainment attorney is not necessarily different from the role played by the attorney in any other business setting. "Entertainment law, like any other type of commercial law, is a combination of legal principles and business practices."[55] With the possible exception of understanding the intricacies of the copyright laws, the problems most creative artists face are not really unique in a legal sense. They fall within standard legal categories such as contract, labor relations, real estate, taxation, and torts.[56] What makes the entertainment attorney's role most challenging and interesting is that these legal problems generally arise in an emotionally charged, creative setting.[57] Entertainment clients may be unsophisticated about business and may resent the intrusion of business reality into the personal aspects of creation. Thus, an entertainment attorney must be able to serve the artist's business needs and respond to the artist's enthusiasm about

52. *Id.* at 382. "In the music business, 'the agency runs at a loss with an artist until that artist is making $7,500 per night.' ") (Interview with Bob Ring, agent with William Morris Agency, (Sept. 6, 1978) *reprinted in* Johnson & Lang, *supra* note 42, at 382 n.37). *See also Questions and Answers, supra* note 27.

53. S. SHEMEL & M. KRASILOVSKY, *supra* note 3, at 73.

54. *Questions and Answers, supra* note 27, at 51.

55. T. SELZ & M. SIMENSKY, *supra* note 5, at 1-1.

56. Engler, *Lawyers for the Creative Arts*, 7 UPDATE ON LAW — REL. EDUC. 50 (Winter 1983).

57. Panel Discussion,*Legal Aspects of Personal Representation*, COMM/ENT ENTERTAINMENT LAW SYMPOSIUM (Jan. 26, 1985) (statement by Penny Semple Von Bozzay, Attorney at Law, San Francisco) [hereinafter Panel Discussion].

projects and emotional attitude about disputes.[58]

The purely legal functions of an entertainment attorney can be divided into two areas: the artist's career and the artist's personal matters.[59] Although contract negotiation comprises the largest portion of work that an attorney will perform for an artist, perhaps the most significant service the attorney performs is protecting the artist's interests in his artistic product from profit-seeking companies and other representatives. Because, as discussed below, an attorney is subject to higher fiduciary standards than a personal manager or talent agent,[60] he

58. *Id.*

59. For example:

> [A]s far as the career of an actor or actress is concerned, a lawyer's function goes through a number of different stages. A lawyer will read your contract if you get an offer from a studio for you to star in a movie. He will discuss that contract with the agent to make sure the contract conforms to the deal and then will try to improve on the form presented by the other side . . . .

Questions and Answers, supra note 27, at 49.

The attorney may also prepare other contracts the artist may need, such as the agency or personal management contract. If disputes arise out of employment, terms or receipts, the attorney will most likely represent the artist in any ensuing litigation. On the personal side, the artist may use the attorney's services for other legal problems, such as personal injury, marital disputes and investment transactions. Outside the legal arena, the attorney may also give personal advice to the artist about business practices and career development.

60. One of the best examples of the extremely high fiduciary standard imposed on an attorney can be seen in Croce v. Kurnit, 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd in part* 737 F.2d 229 (2d. Cir. 1984). *Croce* involved the signing and performance of three recording, management and publishing contracts between Jim and Ingrid Croce, Tommy West, Terry Cashman (both producers and owners of C.P.& W., a recording company) and Philip Kurnit (attorney for West and Cashman, and also president, director and shareholder of various recording industry companies affiliated with C.P.& W). During a series of transactions during 1968, the Croces were not represented by independent legal counsel and were not advised to retain counsel by Kurnit, who signed the contracts he had drafted on behalf of C.P.& W. Defendants' Reply Brief at 7, Croce v. Kurnit, 565 F. Supp. 884 (S.D.N.Y. 1982).

At trial, the court addressed several issues with respect to conflict of interest and breach of fiduciary duty. The court dismissed the fiduciary duty charges against Cashman and West who acted as *managers* and producers for the Croces and held that absent fraud and gross unfairness, Cashman and West could not be held to have breached a fiduciary duty. 565 F. Supp. at 893. Kurnit, as an attorney, did not fare so well. With respect to Kurnit's breach, the court stated:

> Even in the absence of an express attorney-client relationship, however, a lawyer may owe a fiduciary obligation to any persons with whom he deals. In particular, a fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe and rely on him.

Id. at 890 (citations omitted). Having established that Kurnit owed a fiduciary obligation to the Croces, the court focused on Kurnit's breach of the duty through his failure to advise the Croces to obtain outside counsel. The court held:

must act as both an independent advisor and a "watch dog" for his artist-clients.[61]

5. *Attorney Overlap Into Other Areas of Personal Representation*

Entertainment attorneys range from those who advise artists on individual problems to those who manage every aspect of their clients' legal and business affairs.[62] The former confine their representation to those areas where legal advice is needed; the latter become so involved in the affairs of their clients that they either inadvertently or purposely cross the line into the other areas of artist representation.[63] The latter category is the focus of this note.

The transition from performing purely legal services to performing other representative tasks often occurs during contract negotiations. Even when the personal manager or agent is instrumental in procuring the deal, the attorney has a substantial legal role in clarifying the negotiated terms of the contract. Often legal training and experience are so important in coping with the complex rights and responsibilities peculiar to the various entertainment areas, that it is advisable for the entertainment attorney to actually negotiate the contract.[64] In fact, the

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> Kurnit's introduction as "the lawyer," his explanation to the Croces of the "legal ramifications" of the contracts which contained a number of legal terms and concepts, his interest as a principal in the transactions, his failure to advise the Croces to obtain outside counsel, and the Croces lack of independent representation, taken together establish both a fiduciary duty on the part of Kurnit and a breach of that duty.

565 F. Supp. at 890. *See also* Jossen, *supra* note 4, at 117-20.

61. An attorney has a duty of loyalty and while dealing with an artist's other representatives, he should ensure that they too are acting in the artist client's best interests. *See generally* Levy & Sprague, *supra* note 29, at 1113.

62. *See* Engler, *supra* note 56, at 50.

63. Some of the circumstances that frequently exist at the early stages of [the attorney-client] relationship include:

> (1) the manager-attorney relationship with the artist, solely as his attorney;
> (2) the manager attorney representing the artist as his attorney in dealing with others;
> (3) the "marriage" — the assumption of management responsibilities by the attorney-manager.

Biehl, *Tracing the Relationship of Artist and Management to Demonstrate the Many Sources of Litigation*, in COUNSELING CLIENTS IN THE PERFORMING ARTS 583 (1975) *restated in* Jossen, *supra* note 35, at 124 n.110.

64. Making the deal is thought to be the job of the agent and the agent's importance in this area has grown with the increasing complexity of big money deals and changing conditions. In response to the legal and tax problems involved substantial

complexity of contract negotiation may lead the attorney to believe that the talent agent and personal manager are inadequate for the job. Thus, the attorney may expand his role and eliminate the need for other representatives.[65]

Even more common is the inadvertent performance of personal manager or talent agent functions by the attorney. The managerial function of advising and counseling artists in their careers in inextricably bound with problems of law and contracts.[66] Sometimes attorneys gravitate into the managerial functions because there are gray areas between legal advice (the attorney's function) and career advice (the personal manager's function). In some cases, attorneys may even elect to exclusively perform managerial functions.[67]

Many commentators suggest that the balance of representation is upset when the attorney expands his services into other areas of personal representation.[68] By usurping the roles of agent and personal manager, the attorney may actually be

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transactions, attorneys in some instances have moved in. *See* S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 78; 3 A. LINDEY, *supra* note 49, at 1737.

65. The problem is that, though our functions are allied, they are also competitive. . . . A business manager, an agent, a personal manager, a lawyer, working in concert can do wonders, even if they duplicate each other's functions, as long as each person is confident that the others are not going to try and undermine him to get a closer position with the client.

Questions and Answers, supra note 27, at 49.

66. The Code does not limit an attorney to giving solely legal advice, but also allows moral, economic, social and political advice where it is relevant to a client's situation. ABA CODE *supra* note 16, EC 7-8; MODEL RULES 2.1. *See also* 1 J. TAUBMAN, PERFORMING ARTS MANAGEMENT AND THE LAW 47-48 (1972); Jossen, *supra* note 4, at 117.

67. The time commitment required to perform the counseling and advising functions of a personal manager is demanding. *Supra* notes 30-42 and accompanying text. Thus, an attorney who prefers the advising and counseling aspect of his legal function over the advocacy aspect may choose to engage in an area of the entertainment industry where he may perform those services full time.

68. Panel Discussion, *supra* note 57. "A lot of attorneys do take on dual roles, but the value of a professional agent may be greater than you think." *Id.* (Lionel Sobel, Associate Professor of Law, Loyola Law School, Los Angeles). "An artist needs an agent. An attorney should work in conjunction with an agent or personal manager. Let the agent or personal manager sell the deal and as an attorney, you can police the deal." (Donald Engel, Partner, Engel & Engel, Los Angeles). For example:

A lawyer is in a position to do things that agents often cannot. They can afford to be tougher because they don't depend on the ongoing relationships with publishers. They can be sons of bitches. They can go out for the fast buck. An agent, who may have to sell to the same publisher next week a five-thousand dollar advance book instead of a multi-million dollar advance book, can't afford to do that.

Berstein, *Get Me a Lawyer!* 1979 WRITER'S YEARBOOK 76.

working to the detriment of his client because he is an active participant and no longer an impartial advisor "policing" the deal.[69] These commentators posit that the most desirable arrangement for the artist is one in which the artist is represented by a legal expert in addition to a well organized team comprised of an agent, personal manager, and accountant.[70] This "team approach" is designed to assess which services are required in a given situation, thus minimizing duplication of tasks.[71] Even among commentators who have adopted this view, there is some recognition that situations exist where an attorney is the best person to perform multiple roles. This can occur, for example, in situations where the attorney is the most skilled person available;[72] where the efforts of one individual represent the most effective method of handling business;[73] where, in the context of certain fields, such as sports, the athlete usually has only one personal representative;[74] or, lastly, where the attorney-agent may be the one most likely to act in the best interest of this client.

If an attorney begins to perform the advisorial, counseling, and negotiation services of a talent agent or personal manager, it is only logical that the attorney may wish to expand his role further. Over time, the attorney may gain a reputation as an

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69. Panel Discussion, *supra* note 57 (Lionel Sobel and Donald Engel).

70. S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 78; for example:

> A presumption exists that if an artist has a lawyer who knows all of the ins and outs of the industry, knows all of the clauses, the contracts, knows the studio executives, that [there is no need] to pay an agent 10% . . . But, for that 10% the agent gets up every morning and hits the street . . . An attorney can do a marvelous job, and many do, but they're not visiting the studios, all day every day.

Questions and Answers, *supra* note 27, at 50.

71. S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 50.

72. *E.g.*, Panel Discussion, *supra* note 57. "[I]f an attorney has the contacts, understands the business of acting as agent, and has the time to make the contacts, the client may be in the best hands with the attorney [acting as agent]. As long as the attorney can provide the skills, he or she may be providing good services." *Id.* (Von Bozzay, Attorney at Law, San Francisco). "If there is no one more expert than you as an agent, even though you're an attorney, there may be no need to refer the client to an agent." *Id.* (Donald Engel).

73. Panel Discussion, *supra* note 57. "In an unbifurcated field like television and radio where the clients are seeking jobs as anchor people, broadcasters, etc., the system is different. Only one person solicits jobs and represents the media personality because this is the only way to be effective, and an attorney's expertise is important." *Id.* (Leigh Steinberg, Sports Attorney-Athlete's Agent, Berkeley, CA.).

74. For an excellent discussion of the agent-athlete relationship, see Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815 (1981).

active participant in his clients' careers by negotiating deals and giving career advice. Through this representation, the attorney will develop relationships with individuals and companies in the industry. His knowledge of the entertainment business may induce him to accept clients in the early stages of their careers because he believes they have talent and are potentially successful.[75] The attorney may find that his recommendations are sometimes successful in obtaining a contract.[76] The attorney may actively solicit deals for his clients. Some attorneys in the music industry distribute demo tapes for their clients.[77] Eventually, the attorney may find himself performing a variety of services that are beneficial to all phases of his clients' careers.[78] However, once this happens, he can no longer claim that he is only acting as a legal counsel. This transition having occurred, the attorney has entered into dual or multiple occupations.

III
Regulation of the Attorney in His Legal Practice and Secondary Occupation

This section examines the regulation of attorneys acting in their primary occupation as legal counsel and in their secondary occupation as talent agent/personal manager.[79] It defines attorneys' duties and the limitations placed on their behavior, and then focuses on the issue of dual occupations[80] and the ex-

75. *Hearings, supra* note 28, at 41.

76. Halloran, *Music Attorneys*, in THE MUSICIAN'S MANUAL: A PRACTICAL CAREER GUIDE 126, 127 (M. Halloran ed. 1979).

77. *Id.* "Demo tapes" is the short term for demonstration tapes made by artists which contain a sampling of what the artist feels are the best songs he performs.

78. For example, John Mason and J. Owen Sloane, attorneys representing ABBA, Frank Zappa, Cat Stevens, Stevie Nicks, Lindsey Buckingham, and Little River Band, when asked about the most important service provided to a client, replied:

> If one of our clients can maintain success for a couple of years . . . . we'll establish them in business to the extent that they'll be able to function for the rest of their lives without another hit record. I'm very proud of the fact that we don't have a single client whom we haven't helped to make wealthy by means independent of their music during the years of their success.

Mendelsohn, *Attorneys: Life in the Rock World*, Los Angeles Times, Nov. 11, 1979 (Calendar) at 91, col. 2.

79. Section II discusses the general concepts relating to attorneys in dual occupations. The remainder of this note focuses more specifically on attorney-agents and attorney-managers.

80. Due to the dearth of material on the ethical constraints placed upon an attorney-agent or attorney-manager (as found in ABA Formal Opinions, Informal Opin-

isting ethical constraints[81] placed on an attorney choosing to have a secondary occupation.

A. The Role of a Lawyer

A lawyer's professional activities fall roughly into three categories: (1) consulting clients; (2) drafting and negotiating legal instruments; and (3) representing clients before the courts.[82]

Because the lawyer performs so many functions, there exists the possibility that his various responsibilities may come into conflict. In order to help the lawyer uphold his status as an officer of the court, representative, and public citizen, and to further define his role, the bar associations have for many years provided guidelines with respect to attorney conduct.[83] The main thrust of these guidelines is that the lawyer's conduct "should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."[84] Some commentators have criticized the guidelines as being too strict and have suggested that the constraints placed on an attorney border on proscription of constitutionally protected conduct, especially in the area of dual occupation.[85] However, it is generally accepted that voluntary

ions, case law or law review articles), this section will examine other occupations which are by analogy pertinent to the intended focus.

81. The rules that govern attorney conduct stem from a variety of sources: statutes, case law, rules of court, and ethics rules. Every state has a body of professional ethics rules that govern the conduct of lawyers. In all but a few states, these ethics rules are closely patterned after models created by the ABA. All discussion of ethical rules will refer to the Code, except where indicated. The proposed Model Rules will be addressed only where they deviate from the Code, because: (1) the ABA Code has been adopted by most states; (2) California and New York rules are based on the Code; and (3) most of the available case law and ABA ethics opinions refer to the Code. *See generally* State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1983-71 (1983) (for Code effect in California).

82. Halloran, *Music Attorneys*, in THE MUSICIAN'S MANUAL: A PRACTICAL CAREER GUIDE at 126 (M. Halloran ed. 1979). *See also, Lawyers and Certified Public Accountants: A Study of Interprofessional Relations*, 56 A.B.A. J. 776, 778 (1970) ("[T]he lawyer has been the business and personal advisor . . . not only when [clients] are already in trouble, but much more often when they seek guidance to handle transactions properly and to keep out of trouble").

83. For a discussion of the history of the rules of professional responsibility, *see* Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804-05 (1982).

84. CODE, *supra* note 16, Preamble. MODEL RULES, *supra* note 16, Preamble. It is through this conformity that the governance of dual occupation arises.

85. *See* Mintz, *Accountancy and Law: Should Dual Practice be Proscribed?*, 53 A.B.A. J. 225, 226 (1967) ("To practice a profession by those qualified is a right protected by the United States Constitution subject to reasonable regulation by appropriate legal bodies").

entry into the legal profession subjects an attorney to the self-regulation of bar associations.[86]

The most significant body of rules affecting the lawyer is the American Bar Association Code of Professional Responsibility, which dictates an attorney's conduct in many areas. The Code sections that are germane to the issue of dual occupation regulate the attorney-client relationship, fees, conflicts-of-interest, professional independence, and information about legal services, advertising and solicitation.[87]

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86. Steele & Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RESEARCH J. 917, 924 (1976).

87. CODE, *supra* note 16, Disciplinary Rules (DRs).

DR 2-101 Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, . . . ;

(2) One or more fields of law in which the lawyer or law firm practices, . . . to the extent authorized under DR 2-105;

. . . .

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

. . . .

DR 2-102 Professional Notices, Letterheads and Offices.

(A) A lawyer or law firm shal not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a law-

B. Lawyer in a Dual Profession

1. *Can the Attorney Carry on Dual Professions?*

Although no disciplinary rule forbids a lawyer from engaging

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yer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105.

. . . .

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional assocation may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization. . . .

DR 2-103 Recommendation of Professional Employment.

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

. . . .

DR 2-104 Suggestion of Need of Legal Services

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

. . . .

DR 2-105 Limitation of Practice

(A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," "Registered Patent Attorney," or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who publicly discloses fields of law in which the lawyer or

the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].

(3) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself out as such, but only in accordance with the rules prescribed by that authority.

DR 2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR 3-101 Aiding Unauthorized Practice of Law

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

. . . .

DR 3-103 Forming a Partnership with a Non-Lawyer

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

. . . .

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

simultaneously in another business, profession, or endeavor,[88]

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

. . . .

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

. . . .

DR 5-103 Avoiding Acquisition of Interest in Litigation
(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
(1) Acquire a lien granted by law to secure his fee or expenses.
(2) Contract with a client for a reasonable contingency fee in a civil case.

. . . .

DR 5-104 Limiting Business Relations with a Client.
(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.
(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

. . . .

DR 5-105 Refusing to Accept or Continue Employment If the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

88. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972). *See also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 57 (1932), *discussed in Continuing Professional Constraints, Current Legal Trends and Developments in the Entertainment and Sports Industries*, ABA FORUM COMM. OF

constraints on attorney behavior can make it extremely difficult for a lawyer to actually engage in a secondary occupation while still conforming to the high standards imposed on him by the ABA.[89] The disciplinary rules are mandatory and apply uniformly to all lawyers regardless of the nature of their professional activities.[90] Dual practice has traditionally been disfavored for a myriad of reasons,[91] and it appears that this disfavor is, to a certain degree, responsible for the stringent standards set forth by the code.

With respect to one common dual occupation, attorney-certified public accountant, some commentators feel that the motivations for dual practice—higher quality service, convenience, and lower costs to clients—could be outweighed by the arguments against it.[92] For example, critics have argued that "[i]t is too difficult for a lawyer to devote sufficient time to two occupations to keep abreast of current developments."[93] Others

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ENTERTAINMENT AND SPORTS INDUSTRIES (D. Lange ed. 1979) (material from Symposium, Mar. 9-10, 1979).

89. Formal Op. 328, *supra* note 88.

> [A] lawyer may conduct, in compliance with DR 2-102,* his law practice and a second occupation, not law related from one office; and he may practice from the same office both as a lawyer and as a member of a law-related profession or occupation, such as a marriage counselor, accountant, labor relations consultant, real estate broker, or mortgage broker, *if he complies . . . with all provisions of the Code of Professional Responsibility* while conducting his second, law-related occupation.

Id. at 65 (emphasis added).

* The Code was amended in 1980, with the Comm. on Ethics and Professional Responsibility deleting DR 2-102(E), which read:

> A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

CODE *supra* note 16, DR 2-102(E) (amended 1980). However, DR 2-105, *supra* note 87, retains a prohibition about specialization which still gives force to the opinions cited under DR 2-102(E) when combined with the other Disciplinary Rules on advertising. Also, most states which originally adopted the Code in toto, have retained their equivalent to DR 2-102(E).

90. CODE, *supra* note 16, Preamble; CODE, *supra* note 16, Preliminary Statement. *See also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 203 (1940). ("The Canons of this association govern all its members, irrespective of the nature of their practice, and the application of the Canons is not affected by statutes or regulations governing certain activities of lawyers which may prescribe less stringent standards.").

91. *See infra* notes 92-106 and accompanying text.

92. Levy & Sprague, *supra* note 29, at 1114.

93. *Continuing Professional Constraints, supra* note 31, at 1; *see, e.g.*, Levy & Sprague, *supra* note 29.

have asserted that "[t]o be well qualified to serve clients as a lawyer or a C.P.A. is a full-time job,"[94] and that "the public cannot be expected to understand or evaluate competence and is likely to be misled and confused by dual titles."[95] The cost and convenience factors used to justify dual practice are thus distrusted by opponents of dual practice. Opponents fear that lower costs and increased convenience might result in diminished attorney competence.[96] The most common argument against dual practice is that the second occupation really serves as a "feeder"[97] to the law practice[98] and thus constitutes "indirect solicitation" which creates an appearance of impropriety that is inconsistent with a lawyer's duties as a member of the bar.[99] Such solicitation subjects a lay person "to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed . . .and may have an impaired capacity for reason, judgment, and pro-

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> [M]any lawyers feel that the dual practice of law and accounting is not in the public interest for these reasons:
>
> First, the official position of the American Bar Association holds it to be unethical to practice law and accounting at the same time.
>
> Second, it constitutes the representation of a specialty, which is a form of advertising.
>
> Third, it combines the attributes of loyalty and advocacy with that of impartiality.
>
> Fourth, it presupposes a degree of competence in two very difficult disciplines, which most practitioners would find difficult to attain and maintain.

Levy & Sprague, *supra* note 29, at 1113.

94. *Lawyers and Certified Public Accountants: A Study of Interprofessional Relations*, 56 A.B.A. J. 776, 778.

95. *Id.* at 779.

96. Levy & Sprague, *supra* note 29, at 1114-15.

97. Solicitation means client-getting activity that involves personal contact (either oral or written) between a lawyer and a potential client who has not sought the lawyer's legal advice. DR 2-104, *supra* note 87. Indirect solicitation can occur when an attorney's secondary business "is one that will readily lend itself as a means for procuring professional employment [for the attorney]" in his legal role. ABA Comm. on Professional Ethics and Grievances, Formal Op. 57 (1932). When a business serves as a "feeder", the business is being used as a mechanism to stimulate the need for legal services.

98. *Continuing Professional Constraints, supra* note 88, at 2; *see also*, ABA Comm. on Ethics and Professional Responsiblity, Formal Op. 297 (1961); ABA Comm. on Ethics and Professional Responsiblity, Informal Op. 431 (1961) (lawyer-bank director); ABA Comm. on Ethics and Professional Responsibility Informal Op. 501 (1962) (lawyer-title insurance agent). *See generally*, Burke, *Dueling over the Dual Practice*, 27 MD. L. REV. 142 (1967); Wilson, *The Attorney-CPA and the Dual Practice Problem*, 36 U. DETROIT L.J. 457 (1959).

99. *E.g.*, ABA Comm. on Professional Ethics and Grievances, Formal Op. 57 (1932); *Code* EC 9-6 (1981) (a lawyer should avoid even the appearance of professional impropriety).

tective self-interest."[100]

Determining whether an attorney's dual practice should be proscribed has traditionally been based on a separation of attorney activities into categories defined as related and unrelated occupations.[101] An unrelated occupation is one in which the products or services provided by the attorney to the customers or clients do not involve services which would be essentially legal in nature.[102] An unrelated occupation is exemplified by an attorney's operation of a shopping center, retail store, or manufacturing enterprise.[103] The ABA contends that unrelated occupations present less risk of improper or unprofessional conduct than do related occupations primarily because it is easier for the public to distinguish a lawyer's legal conduct from his unrelated conduct.[104]

On the other hand, where the secondary occupation is, for example, that of accountant, collection agent, claims adjuster, labor relations consultant, business consultant, insurance agent, marriage counselor, real estate broker, income tax specialist, or loan or mortgage broker, the lawyer's activity would likely involve solutions to problems that are essentially legal in nature, these secondary occupations are considered to be related.[105] It is only in a related occupation that the attorney is

100. MODEL RULES, *supra* note 16, Rule 7.3 comment (1983) (based on DR 2-103(A), *supra* note 87; CANONS OF PROFESSIONAL ETHICS 28 (1908)). The specific terms "indirect solicitation" and "feeding" were dropped from the rules when the ABA adopted the Code. Formal Op. 328, *supra* note 88.

101. *See generally Continuing Professional Constraints, supra* note 88.

102. *See* New York State Bar Association Comm. on Ethics and Professional Responsibility, Formal Op. 206 (1971), *reprinted in* 44 N.Y.S.B.J. 120 (1972).

103. *Id.*; *Continuing Professional Constraints, supra* note 88, at 4. *But see* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1497 (1983), *reprinted in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT [hereinafter LAWYER'S MANUAL].

> The practice of medicine is not generally the practice of a law related profession, but medical considerations may frequently have a bearing on legal issues such as one's legal capacity, entitlement to insurance proceeds, liability in a medical malpractice case, or the extent of injury in a personal injury case. Particularly if the lawyer/physician practices . . . from a single office, the client or patient may not always clearly distinguish between medical and legal advice where the medical and legal isues are related. The lawyer/physician should make it clear to the client or patient the capacity in which he or she is serving.

LAWYER'S MANUAL, *supra* at 801:344.

104. *See* Formal Op. 206, *supra* note 102.

105. *Id.*; *Continuing Professional Constraints, supra* note 88, at 5. "[I]n carrying on law related occupations and professions, the lawyer almost inevitably will engage to some extent in the practice of law, even though the activities are such that a lay-

subject to the standards of the bar.[106]

2. *Conduct of the Dual Occupation*

An attorney must meet all applicable ABA rules when performing a secondary occupation.[107] Under the Code, an attorney must avoid confusion, conflict of interest and an appearance of impropriety in his secondary activities.[108] In addition, he must follow the rules pertaining to solicitation, advertising, and compensation.[109]

3. *Avoiding Confusion*

Avoiding confusion among the various functions is the most common problem an attorney must overcome. State bar associations generally require that an attorney separate the activities of his two occupations.[110] The harshest application of this rule requires an attorney either to maintain separate offices[111]

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man can engage in them without being engaged in the practice of law." *Id.* at 3; *accord* Idaho State Bar Comm. on Ethics, Formal Op. 103 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:2901. Part of the reason the attorney is considered to inevitably be carrying on the practice of law is that an attorney has a duty to render candid advice which includes giving advice beyond the law as to moral, economic, social and political issues where relevant to a client's situation. *See* CODE, *supra* note 16, EC 7-8 and MODEL RULES, *supra* note 16, Rule 2.1.

106. Formal Op. 328, *supra* note 88. For example, fees set by a lawyer operating a mortgage brokerage or loan brokerage business from his law office must conform to DR 2-106, *supra* note 87. Additionally, publicity for the second occupation and methods of seeking business must be in accord with DR 2-101, DR 2-103 and DR 2-104, *supra* note 87.

107. *See* note 88 and accompanying text. *See also* Standing Comm. on Professional Responsibility and Conduct, State Bar of Cal., Op. 69 (1982) (Attorney-Real Estate Broker), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:1604; Formal Op. 384 (1980) (Attorney-Real Estate Broker, *reprinted in* LAWYER'S MANUAL *supra* note 103, at 801:1701; Idaho State Bar Comm. on Ethics, Formal Op. 103 (1981) (Attorney-financial consultant), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801-2901; Ethics Comm. of the State Bar of Mont., Op. 22 (1981) (Attorney-life insurance agent), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:6110.

108. Formal Op. 328, *supra* note 88.

109. *Id.*

110. *See, e.g.*, Ethics Comm. of the State Bar of Mont., Op. 17 (1980), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:5403 (attorney-real estate broker) (simultaneous practice is allowed if the attorney completely separates the practice of law from the other business.).

111. *See* Ethics Comm. of the Mo. State Bar, Informal Op. 3 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:5255 (attorney-small business consultant with non-lawyer partner) ("[t]he lawyer may not, in any event, practice law from the same office."); Comm. on Professional Ethics, Ill. State Bar Assoc, Op. 706 (1980), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:3006 (lawyer-physician) ("[a] lawyer may also practice medicine . . . if separate offices are kept and other efforts are

or abstain from providing both legal and non-legal services to the same client.[112] In most situations, however, an attorney is only required to maintain a clear distinction between the two practices, specifically by avoiding the commingling of expenses, receipts, files, and records.[113]

4. *Confidentiality*

When an attorney is acting in a dual capacity he must be cautious of the conflicting duties of confidence and disclosure that may be placed upon him by each of his occupations.[114] The lawyer may have a duty under the Code to preserve confidences and secrets or information acquired in carrying on the second occupation, even though others engaged in that occupation do not have a similar duty.[115]

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made to isolate the two practices."); Ethics Advisory Comm. of the S.C. State Bar, Op. 10 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:7902 (attorney-officer, stockholder, or director of real estate purchasing and loan closing business) ("collateral business should be kept separate and apart from the practice of law.").

112. *See* Comm. on Professional and Judicial Ethics of the State Bar of Mich., Op. CI-931 (1983), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:4867 ("attorney who has an ownership interest in another business may operate the business from the same office as his law practice provided the operation *and clients* remain distinct.") (emphasis added); Legal Ethics Comm. of the Dallas Bar Assoc., Op. 11 (1981), *reprinted in* LAWYER'S MANUAL, *supra*, note 103, at 801:8404 (a lawyer who is a financial consultant for a financial management corporation may act "as an independent contractor provided no other actions are taken that might involve the performance of legal services for financial consultation clients.").

113. *See* Ethics Comm. of the Mo. State Bar, Op. 22 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:5404 (lawyer-accountant) ("[c]ommingling funds . . . would unavoidably give the appearance of impropriety."); Advisory Comm. of the Neb. State Bar Assoc., Op. 3 (1983), *reprinted in* LAWYER'S MANUAL,*supra* note 103, at 801:5504 (lawyer-psychiatrist) ("A lawyer practicing a second profession must maintain separate files for each practice and must maintain the confidentiality of legal files and records."). Perhaps the most drastic definition of separateness found in Comm. on Professional and Judicial Ethics of the State Bar of Mich., Op. CI-931 (1983), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:4867.

> An attorney who has an ownership interest in another business may operate the business from the same office as his law practice provided the operations and clients remain distinct; separate entrance and reception areas are used; common areas are not used in such a way that operations and customers of the two practices become intermingled; and separate telephone lines are maintained.

Id.

114. *See, e.g.*, Standing Comm. on Professional Responsibility and Conduct, State Bar of Cal., Op. 69 (1982), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:1604 (attorney-real estate broker) ("the broker's duty to disclose material information versus an attorney's obligation to preserve a client's confidences.") *See also* CAL. BUS. & PROF. CODE §§ 6067, 6068(e), 10131-10133; CODE, *supra* note 16, DR 4-101.

115. *See* Formal Op. 328, *supra* note 88, at 65 (attorney-accountant); Ethics Comm.

5. *Conflict of Interest*

Two aspects of conflict of interest affect attorneys acting in a dual occupation: conflict between the interests of different clients utilizing the attorney's services, and conflict between an attorney's non-legal interests and the interests of his client. Although these are issues that any attorney may face, the potential conflict may become amplified for an attorney who undertakes a secondary occupation, due to the increased level of personal interest and number of clients within a specific subject area.

The attorney wants the secondary occupation to be lucrative and successful, and, depending on the nature of the second occupation, a proprietary,[116] possessory,[117] security[118] or pecuniary[119] interest adverse to a client may exist in violation of the Code.[120] Therefore, an attorney is under an obligation to determine whether his self-interest will interfere with the exercise of his professional judgment on behalf of his client.[121] An attorney is not prohibited from providing legal representation to a client who has a potentially conflicting or similar interest in the attorney's secondary occupation.[122] However, the attorney must fully disclose the possible effect that the similar or con-

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of the Los Angeles County Bar Assoc., Op. 384 (1980), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:1701 (attorney-real estate broker).

116. A "proprietary interest" is "[t]he interest of an owner of property together with all rights appurtenant thereto such as the right to vote shares of stock and right to participate in managing if the person has a proprietary interest in the shares." BLACK'S LAW DICTIONARY 1098 (5th ed. 1979).

117. A "possessory interest" is a "[r]ight to exert control over specific land to the exclusion of others . . . though it need not be accompanied by title." *Id.* at 1049.

118. A "security interest" is "any interest in property acquired by contract for the purpose of securing payment or performance of an obligation indemnifying against loss or liability." *Id.* at 1217.

119. A "pecuniary interest" is "[a] direct interest related to money in an action or case as would, for example, require a judge to disqualify himself from sitting on a case if he owned stock in a corporate party." *Id.* at 1018.

120. *See* DR 5-104(A), *supra* note 87; MODEL RULES, *supra* note 16, Rule 1.8(a); CAL. RULE OF PROFESSIONAL RESPONSIBILITY 5-101.

> Because of the inherent conflicts that may arise between the interest of an attorney in representing a client and the interest of an attorney who is acting as the broker, it follows that this conflict of interest prohibits the attorney from acting as attorney at the same time that he acts as a broker. Such an arrangement would contravene DR 5-105(A) and DR 5-107(B) of the Code.

Comm. on Professional Ethics of the Bar Association of Nassau County, Op. 3 (1984), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:184.

121. Colo. Bar Association Ethics Comm., Op. 57(2) (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:1901 (attorney-business transaction with client).

122. DR 5-104, *supra* note 87.

flicting interests of the secondary occupation would have on the legal representation for the client.[123]

6. *Limitations on Practice, Advertising, and Publicity*

Traditionally a lawyer has been forbidden from publicly stating or implying that he is a specialist in any area of law.[124] The rationale for this rule is that such a communication will be misleading[125] or will constitute unfair "touting," allowing an attorney to bring in engagements which he would not otherwise attract.[126] This same principle has been applied to attorneys acting in a dual profession. Commentators suggest that allowing an attorney to state that he is engaged in a secondary occupation may misleadingly imply that he is a specialist in the area of law connected with that secondary occupation.[127] In recent years there has been a growing acceptance of lawyer advertising[128] and a subsequent relaxation in the strict rules barring an attorney from stating or advertising his qualifications. However, in spite of the liberalization of attorney advertising rules, some jurisdictions still preclude a lawyer from communicating any skills he may have beyond his basic legal training.[129]

Even where an attorney is allowed to advertise his training in both of his professional capacities, there are varying levels of

123. Comm. on Professional Ethics, Ill. State Bar Assoc., Op. 706 (1980), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:3006 (attorney-physician).

124. DR 2-105, *supra* note 88; CODE, *supra* note 16, EC 2-14 (an exception is expressly allowed if an attorney practices in the areas of Patent, Trademark and other specialties allowed by state law). *See also* CANONS OF PROFESSIONAL ETHICS 27 (1908).

125. MODEL RULES, *supra* note 16, Rule 7.4 comment.

126. Mintz, *Accountancy and Law: Should Dual Practice be Proscribed?* 53 A.B.A. J. 225, 229 (1967).

127. *Id.*

128. The first major change was reflected in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), where the Court held that "advertising by attorneys may not be subjected to blanket suppression . . ." *Id.* at 383.

129. *See* Ethics Comm. of the State Bar of Mont., Op. 17 (1980), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:5403 (attorney-real estate broker) (an attorney may not "identify himself as a lawyer in connection with any publication or printing of the other business"); ETHICS ADVISORY COMM. OF THE S.C. STATE BAR, Op. 10 (1981), *reprinted in* LAWYER'S MANUAL, *supra*, note 103, at 801:7902 (attorney-real estate, loan closing business) ("the lawyer must not identify himself as a lawyer in any publication regarding the business."). Model Rule 7.4 is more stringent than the Code; the Model Rules prohibit any type of statement to the effect that an attorney's practice is limited or concentrated in one or more fields. *See* MODEL RULES *supra* note 16, Rule 7.4 comment. This could have restrictive effects even in the states that allow more liberal conduct, if adopted by those states.

allowable conduct. Some jurisdictions allow a lawyer to identify his two professions on his letterhead, office sign or professional card.[130] Others may allow him to advertise his dual status only in publications connected with his non-legal practice[131] or in his legal advertising literature provided that the secondary occupation requires qualifications that are related to the practice of law.[132] Generally, even if an attorney is allowed to list dual professional status in legal advertisements, the advertisement must be dignified and may not include an advertisement of the attorney's secondary occupational services.[133]

7. *Solicitation*

Except in limited circumstances, an attorney is barred from accepting employment that arises from his suggestion that a non-client needs legal services.[134] The attorney is precluded from using his secondary business to solicit clients for his law practice,[135] and is often prohibited from accepting legal clients where he has given unsolicited advice[136] or where the matter originated from the attorney's secondary occupation.[137] If a po-

130. *E.g.*, Advisory Comm. of the Neb. State Board, Op. 3 (1983), *reprinted in* LAWYER'S MANUAL,*supra* note 103, at 801:5504 (attorney-psychiatrist); Ethics Comm. of the Los Angeles County Bar Assoc., Formal Op. 384 (1980), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:1701 (attorney-real estate broker).

131. Neb. Op. 3, *supra* note 130.

132. Comm. on Professional and Judicial Ethics of the State Bar of Mich., Op. CI-598 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:4816-17 (attorney-other business).

133. *See* Ethics Comm of the Los Angeles County Bar Assoc., Formal Op. 384 (1980), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:1701 (attorney-real estate broker) (an attorney is only allowed to advertise his *ability* to act in both capacities).

134. None of the enumerated exceptions includes the practice of a secondary occupation. DR 2-104, *supra* note 87. *See also* CODE, *supra* note 16, EC 2-4; Comm. on Professional Ethics, Ill. State Bar Assoc., Op. 745 (1982), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:3009 (the dual practice of attorney-marriage counselor "is not per se unethical, [but] the lawyer opens the door for accusations of solicitation of legal business when the other occupation is performed from the same location and for the benefit of the same client.").

135. *Id. See also* Comm. on Professional Ethics of the Bar Assoc. of Nassau County, Op. 3 (1984), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:184 (attorney-real estate broker); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1497 (1983),*reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:5504 (attorney-psychiatrist); New York City Ethics Comm., Op. 77 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:6328 (attorney-computer consultant).

136. *See, e.g.*, New York State Ethics Comm., Op. 556 (1984), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:6110 (attorney-title insurance issuer); Informal Op. 1497, *supra* note 135.

137. Formal Op. 206, *supra* note 104.

tential client approaches an attorney seeking to utilize the attorney's services in both his legal and non-legal capacities, it is not clear what the ABA would advise the attorney to do. The lack of ABA guidelines in this area has prompted commentators to suggest that the attorney would be allowed to represent the client in the dual capacity provided the attorney followed the ABA rules regarding conflict of interest.[138]

8. *Compensation*

Alternative fee arrangements have also been a source of concern. It has been established that a contingency or percentage fee based on settlement or success of a given transaction is allowable.[139] This is important for an attorney engaging in a secondary occupation because the services performed in such an occupation may not be conducive to an hourly fee arrangement. In both the attorney's legal practice and secondary occupation, fee setting is governed by a standard of reasonableness.[140] If the attorney does not charge an hourly rate, he may be compensated as set out in a written fee arrangement.[141]

C. The Real World: Compliance and Enforcement

Although the aforementioned constraints may appear rigid, their proscriptive value should be examined in light of the regulatory procedure embraced by the ABA. "The regulation of the legal profession is primarily under the control of state

138. *See* notes 116-23 and accompanying text.

139. *See, e.g.*, Todd v. City of Visalia, 254 Cal. App. 2d 679, 689, 62 Cal. Rptr. 485, 482 (1967) ("An attorney has a right to contract for compensation for his services, and it was not improper for him to secure a contingent provision based upon success."); Brillhart v. Hudson, 455 P.2d 878, 881, 169 Colo. 329 (Sup. Ct. 1969) (although the court held that a contingent fee resulting in recovery of $7,500 for a $50,000 sale of a pool hall was unreasonable, it also said that it is permissible for an attorney to contract for a reasonable contingency fee, with the court reserving the right to subject the amount to the test of quantum meruit).

140. *See, e.g.*, Ethics Comm. of the State Bar of Mont., Op. 22 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:5404; DR 2-106, *supra* note 87 (an attorney should rigorously adhere to the code in setting fees).

141. Standing Comm. on Professional Responsibility and Conduct, State Bar of Cal., Op. 69 (1982), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:1604 (an attorney-real estate broker "may be compensated as set out in a written fee agreement either by sharing in the real estate broker's commission upon the transaction's completion or at the attorney's usual hourly rate if the transaction is not consummated"). *Cf.* Ethics Comm. of the State Bar of Mont., Op. 22 (1981), *reprinted in* LAWYER'S MANUAL, *supra* note 103, at 801:5404 (an attorney-life insurance agent "may be compensated both on a percentage of the premium price paid for policies and for drafting services").

supreme courts. In all but a few states, however, supreme court control. . .means little more than rulemaking and an involvement in disciplinary review."[142] The primary responsibility for enforcement of rules and "discipline lies with state or local bar organizations."[143] With few exceptions, these organizations "maintain no significant self-initiating investigative" procedures.[144] Instead they merely investigate third party complaints received from clients and other attorneys.[145] "The fact that individual clients are the primary source of complaints tends. . .to limit the range of lawyer misconduct that [is] reported."[146] "Few clients complain about solicitation and virtually none [complain] about misconduct" which benefits the client.[147]

Since state bar organizations are primarily dependent on client complaints, many of the bars' disciplinary rules become mere ethical guidelines that an attorney may or may not choose to follow. The result is that within the sphere of legal services there often is no real limitation on what the practitioner should or should not undertake. The scope of an attorney's practice is thus primarily left to the individual attorney and to those who become his clients.[148] The ABA is hopeful that the attorney will understand that the rules are for the protection of clients,[149] and that attorneys will want to uphold the respectability and integrity of the profession.[150]

To summarize, a lawyer acting in a dual capacity or secondary occupation must be attuned to which of his functions relate to legal counseling and which do not. If secondary functions are related, as agent and manager services are,[151] the

142. Steele & Nimmer, *supra* note 86, at 921 (federal courts and agencies separately regulate attorneys who practice before them).

143. *Id.*

144. *Id.* at 922.

145. *Id.*

146. Client complaints "tend to deal with contractual disputes concerning the quality of legal services rendered or an attorney's failure to meet his client's expectations as to cost or promptness of service." *Id.* at 923.

147. *Id.* at 949.

148. Mintz, *supra* note 126, at 228.

149. The fact that ABA-accredited law schools are now required to offer courses on professional responsibility and that many states require bar applicants to pass the National Professional Responsibility Exam, shows the attempt by the ABA and state bar associations to instill ethical values in attorneys. *See, e.g.*, MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION INFORMATION BOOKLET ii (1986).

150. Steele & Nimmer, *supra* note 86, at 921.

151. *See supra* notes 62-78 and accompanying text.

Code requires that the attorney follow ethical rules pertaining to avoidance of confusion, confidentiality, conflict of interest, limitation of practice, solicitation, and compensation.

IV
The Non-ABA Rules Governing the Secondary Occupation

The activities of attorneys acting in their agent or manager capacity are also governed by a number of rules which emanate from outside the legal profession. States, legislatures, guilds and unions place additional constraints on personal representatives. In an attempt to protect artists and facilitate business relationships within the entertainment industry, these entities have promulgated regulations that govern an attorney in his secondary occupation of talent agent or manager.

Determining which rules will govern an attorney's secondary occupation depends upon whether the attorney is performing the functions of a personal manager[152] or a talent agent[153] and whether the attorney is practicing law in New York, California, or another state.[154] As discussed previously, the functions of each personal representative overlap; this has created confusion and competition within the entertainment industry and has sparked debate as to what constitutes the best procedure for regulating personal representatives.[155] This confusion is exemplified by the fact that the California legislature has repeatedly amended its statute regulating artists' managers since it first "recognized the difference between artists' managers and ordinary employment agencies" in 1943.[156] California is still

152. *See supra* notes 30-42 and accompanying text.

153. *See supra* notes 43-52 and accompanying text.

154. The entertainment business is concentrated in limited geographic areas — primarily New York and California. Each of these states regulates talent agents and personal managers differently. *See infra* notes 160-201 and accompanying text.

155. *See generally Hearings, supra* note 28.

156. More specifically, in 1943 the California legislature enacted statutes to regulate artists managers within the regulatory scheme applicable to employment agencies in order to bring them under the jurisdiction of the Labor Commissioner. Act approved May 2, 1943, ch 329, 1943 Cal. Stat. 1326. In 1959, the Artists Managers Act was added to the Labor Code and separated from employment agency legislation. Artists' Managers Act ch. 888, 1959 Cal. Stat. 2920. In 1967, the Labor Code sections regulating employment agencies were repealed and jurisdiction shifted to the Bureau of Employment Agencies, Act approved Aug. 28, 1967, ch. 1505, §§ 2, 3, 13, 14, 1967 Cal. Stat. 3571, 3572. In 1975, the Whetmore Musician's Booking Agency Act was enacted. Whetmore Musician's Booking Agency Act, ch. 1236, 1975 Cal. Stat. 3138. In 1978, the

grappling with its regulatory scheme — it created the California Entertainment Commission in 1982 to study the entertainment industry and propose new legislation.[157]

In addition to state laws, entertainment guilds and unions control the conduct of personal representatives. Such regulations and restrictions regarding exact contract provisions and fees reach further than state laws and are thought to be more stringent than the state originated restrictions.[158]

Many practitioners in the entertainment industry are unaware that their status as an attorney does *not* immunize their practice as a talent agent or personal manager from these other regulations.[159] An attorney who, in addition to legal advice, provides talent agent or personal manager services needs to know of, understand, and meet the requirements placed on him by the applicable state and entertainment unions.

A. Rules Governing Business Conduct

1. *State Law in New York and California*

In California and New York, talent agents are regulated by

Whetmore Act was repealed and the Artist Managers Act became the Talent Agency Act which clarified that talent agents were under the jurisdiction of the Labor Commissioner and not the Business and Professions Code or the Bureau of Employment Agencies. Talent Agency Act, ch. 1382, § 6, 1978 Cal. Stat. 4576. In 1982, the legislature added a temporary exception providing that the procuring of record contracts was not of itself subject to regulation. Act approved Aug. 31, 1982, ch. 682, § 1, 1982 Cal. Stat 2814, 2815. In 1984, A.B. 3753 extended the 1982 provision for an additional year pending a report by the Entertainment Commission regarding a model bill. Act effective July 17, 1984, ch. 553, § 7, 1984 Cal. Adv. Legis. Serv. 413, 414 (Deering). For a more in-depth history of the Artists Managers Act, CAL. LAB. CODE §§ 1700.1-.47 (West 1971 and Supp. 1986), from inception through 1978, see Note, *supra* note 28, at 357-61; Johnson & Lang, *supra* note 42. For a discussion of the Act since 1978 see Brindze, *California Assembly Bill 997: The Personal Managers Relief Act*, in 1983 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 247.

157. Brindze, *supra* note 156, at 250. The Entertainment Commission's mandate states:

> The Commission shall study the laws and practices of this state, the state of New York, and other entertainment capitals of the United States relating to the licensing of agents and representation of artists in the entertainment industry in general, and in the recording industry in particular, so to enable the Commission to recommend to the legislature a model bill regarding this licensing.

CAL. LAB. CODE § 1702 (West Supp. 1983) (CAL. LAB. CODE §§ 1701-04 (West Supp. 1986), establishing the entertainment commission, was repealed by its own terms on January 1, 1986).

158. *See infra* notes 202-12 and accompanying text.

159. *See, e.g., Hearings, supra* note 28, at 222; Panel Discussion, *supra* note 57 (Donald Engel, Lionel Sobel, and Penny Semple Von Bozzay).

statute.[160] Although no specific statutory legislation exists with respect to personal managers, they are in large measure regulated by virtue of the definition of talent agent or theatrical agent.[161] The personal manager is generally prohibited from seeking employment for the artist, while the talent agent is required to seek employment and is permitted to advise, counsel and direct the artist in the development of the artist's career.[162] The extent of regulation in New York and California differ in important respects and merit further examination.

(a) *California*

Under California's Talent Agency Act,[163] a talent agent is required to obtain an employment agency license which gives the agent the right to procure employment for the entertainer.[164] The talent agent must put up a bond,[165] present references,[166] establish an office approved by the commissioner,[167] submit a fee schedule,[168] submit all form contracts with artists to the Labor Commissioner for approval,[169] permit the artist to termi-

160. CAL. LAB. CODE §§ 1700-.47 (West 1971 and Supp. 1986); N.Y. ARTS & CULT. AFF. LAW §§ 37.01-.05 (McKinney 1983).

161. *See supra* notes 30-42 and accompanying text (personal managers); *supra* notes 43-52 and accompanying text (talent agents).

162. Thaler & Joseph, *supra* note 31, at 2.

163. *See* CAL. LAB. CODE §§ 1700-.47 (West 1971 and Supp. 1986) (law regulating talent agents). For the definition of talent agency as defined by section 1700.4, *see supra* text accompanying note 44. Section 1700.5 sets forth the necessity of attaining a license: "No person shall engage in or carry on the occupation of a talent agency without first procuring a license therefor from the Labor Commissioner. . . ." *Id.* Sections 1700-.4 set forth the scope and definitions, sections 1700.6-.22 discuss licensing provisions), and sections 1700.23-.46 contain operation and management provisions.

164. *Questions and Answers, supra* note 27, at 45.

165. CAL. LAB. CODE § 1700.15 (West Supp. 1986).

166. CAL. LAB. CODE §§ 1700.6, 1700.9 (West Supp. 1986).

167. *Id.*

168. CAL. LAB. CODE § 1700.24 (West Supp. 1986).

169. CAL. LAB. CODE § 1700.23 (West Supp. 1986). The exact provisions required in such contracts are:

> (a) term of employment;
> (b) compensation to the artists' manager not to exceed rate . . . set . . . forth in schedule of fees filed with the Labor Commissioner . . .;
> (c) The artists' manager has a duty to advise, counsel or direct the artist in the . . . development of his professional career;
> (d) reasonable efforts to procure employment in the field artists' manager is representing the artist;
> (e) termination of contract if failure to obtain employment for any time in excess of four months, provided that artist was ready, willing, able and available to accept employment;
> (f) all cases of controversy between artists' manager and an artist arising

nate the agent's contract if engagements are not forthcoming within a 120 day period,[170] and agree to submit all disputes to the Labor Commissioner.[171] Any employment contract procured in violation of the Act could be vitiated and any individual negotiating such a contract could be subject to possible repayment of any commissions received from the artist.[172]

Over the years, there has been confusion as to whether personal representatives other than talent agents are subject to the Talent Agency Act.[173] The definition of "talent agent" embodied in the Act includes anyone who engages in the occupation of "procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists. Talent agents may, in addition, counsel or direct artists in the development of their professional careers."[174] As a result of this broad definition, personal managers claimed that the Act was too harsh in that it precluded them from procuring engagements,[175] unless they held an employment agency license.

In 1982, new legislation amended the Talent Agency Act.[176]

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under the Labor Code . . . relating to the terms of the contract shall be referred [1] to the Labor Commissioner.

CAL. ADMIN. CODE § 12001 (1970) (LABOR STANDARDS ENFORCEMENT, art. VI, General Rules and Regulations for Artists' Managers).

170. CAL. LAB. CODE § 1700.23 (West Supp. 1986); CAL. ADMIN. CODE § 12001 (1970).

171. CAL. LAB. CODE § 1700.23 (West Supp. 1986); CAL. ADMIN. CODE § 12001 (1970).

172. Thaler, *supra* note 31, at 9. *See also* Buchwald v. Superior Court, 254 Cal. App. 2d 347, 351, 62 Cal. Rptr. 364, 367 (1967); Johnson & Lang, *supra* note 42, at 398.

173. Since a voluminous amount of material has been written on the scope of the Talent Agent Act and its regulatory scheme, this note will briefly address the matter in the context of the attorney-agent and attorney-manager.

174. CAL. LAB. CODE § 1700.4 (West Supp. 1986).

175. *See supra* notes 105-17 and accompanying text.

176. The 1982 legislation performs six principal functions:

(1) It removes entirely the activities of promising to procure, offering to procure, and procuring a *recording* contract from the list of activities that define a talent agency.

(2) It clarifies that a person acting in conjunction with a talent agent and working at the talent agent's request in procuring or attempting to procure employment does not, by so working with a talent agent, become a talent agent.

(3) It places a one-year statute of limitations on violations of the applicable provisions of the Labor Code.

(4) It removes all criminal penalties for violation of these provisions.

(5) It sets up the California Entertainment Commission to study and propose new legislation.

(6) It self-destructs on January 1, 1985.

Brindze, *supra* note 156, at 250.

A new exemption was added which stated that "the activities of procuring, offering, or promising to procure *recording contracts* for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter."[177] Thus, the amendment provided personal managers and attorneys an opportunity to procure recording contracts without satisfying the rigid employment agency licensing requirements under the Act. The main benefit of the exemption was that it recognized that recording contracts are usually negotiated by personal managers and attorneys, rather than talent agents.[178] It also allowed unlicensed personal representatives to negotiate contracts if working with, and at the request of, a licensed and franchised talent agent.[179]

Enforcement power and jurisdiction of the Talent Agency Act lie with the California Labor Commission.[180] Thus, if a dispute or controversy arises between artists and individuals who perform the services of a talent agent, the California Labor Commission has original jurisdiction over the action.[181] The Labor Commission has the authority to establish the liability of the parties involved,[182] void any contracts between the parties, stop payment of any further compensation, and use discretion to determine whether the artist should receive restitution of all monies paid to the personal representative or whether the unlicensed talent agent is entitled to keep his or her compensation on the basis of quantum meruit.[183] After the Labor Commis-

177. CAL. LAB. CODE § 1700.4 (West Supp. 1983) (repealed 1986) (emphasis added). *See also supra* note 158.

178. Brindze, *supra* note 156, at 251.

179. It shall not be unlawful for a person or corporation who is not licensed under this chapter to act in conjunction with and at the request of a duly licensed and franchised talent agency in the negotiations of an employment contract.

CAL. LAB. CODE § 1700.44 (West. Supp. 1983) (repealed 1986). *See also*, Brindze, *supra* note 156, at 252.

180. Note, *supra* note 32, at 846-57 for an in-depth examination of how the Labor Commissioner regulates talent agent disputes.

181. Under § 1700.45, the parties can substitute a provision providing for decision by arbitration in lieu of initial determination by the Labor Commission. CAL. LAB. CODE § 1700.45 (West Supp. 1986). *See* Singer, *Regulation of Talent Agents: The Richard Pryor Determination*, 1983 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 255.

182. Buchwald v. Superior Court, 254 Cal. App. 2d 347, 358, 62 Cal. Rptr. 364, 371 (1967). (The court reaffirmed that the Labor Commissioner's office is the exclusive forum in which a dispute could be initiated when a violation of the Artists' Managers Act is at issue.)

183. *See* Singer, *supra* note 181, at 258.

sion resolves the controversy between the artist and talent agent, a party has the right to appeal to the superior court, where the matter will be heard in a trial de novo.[184]

Commentators have observed that the Talent Agency Act has no substantive impact, and that the only time the statute is effective is when an agent wants to sue for a fee,[185] or a client wants to void a contract with a personal manager.[186] The Labor Commission relies on complaints from performers, unions, talent agents and attorneys as to unauthorized procurement activity.[187] Once the complaint is received, the Labor Commission is required to investigate the matter. If it finds that an individual is acting as an unlicensed talent agent, it is required to enforce the Talent Agency Act by filing a criminal complaint with the District Attorney's Office.[188] In the absence of a complaint, the Labor Commission rarely initiates overt action to enforce the Act's provisions.[189] The Labor Commission has admitted that it

184. CAL. LAB. CODE § 1700.44 (West Supp. 1986).

185. Panel Discussion, *supra* note 57 (Donald Engel).

186. *E.g.*, Buchwald v. Superior Court, 254 Cal. App. 2d 347, 350-51; 62 Cal. Rptr. 364, 366-67 (1967). (The Jefferson Airplane brought suit against their personal manager, Katz, to rescind the contract between them on the grounds that Katz had violated the Talent Agency Act.)

187. In general it is thought that California's licensing of occupations is inconsistent and haphazard. Cathcart & Graff, *Occupational Licensing: Factoring It Out*, 9 PAC. L.J. 147, 148 (1978).

188. *Hearings, supra* note 28, at 192-93 ([A violation of § 1700 is a misdemeanor] generally . . . we try to get them to get a license.").

189. Halloran, *supra* note 76, at 127 ("The California Labor Commissioner maintains that lawyer-agents should be licensed, but so far the Commissioner has not taken any overt action in this regard."); *Hearings, supra* note 28, at 222. Although the Labor Commission maintains that attorneys must be licensed as talent agents, confusion runs rampant among individuals in the field, including legislators and attorneys. During the 1975 Hearings before the Industrial Relations Committee, there was some debate on whether attorneys were meant to be covered by the Act. Senator Whetmore stated that it was not his intent in drafting the bill for the Musicians Booking Agent Act to bring lawyers or certified public accountants in, merely because they were drafting contracts for a musician. *Hearings, supra* note 28, at 20. Mr. Davis, President of Conference of Personal Managers, West, did not feel that attorneys were subject, because the state bar was too strong, and that it was unnecessary to duplicate regulation regarding the fiduciary responsibility for an attorney. *Hearings, supra* note 28, at 43. Senator Presley seemed to feel that if an attorney was in the business of talent agency then the attorney should be licensed. *Hearings, supra* note 28, at 44. Mr. Loromer, attorney with Loeb & Loeb, stated that "lawyers would not be covered because they have a license which at the present time and historically has covered this kind of an area, but the unlicensed people, the public relations consultants and the personal managers, obviously are the persons they intend to cover." *Hearings, supra* note 28, at 121. It is unclear as to whether this confusion exists because the Labor Commission has been passive in the action taken, or because of the lack of express intent in the legislation. Regardless, since the Labor Commission has been delegated

has no specific legislative authority over the amount of commissions paid between managers and artists, and that its sole substantive policing power involves examining submitted contracts to insure that the terms are not unjust or oppressive.[190]

In conclusion, it is likely that California attorneys will be subject to the licensing requirements of the Talent Agency Act if they perform procurement services for an artist.[191] Under the most recent legislation, an attorney is only exempt from licensing if he procures or negotiates recording contracts as opposed to procuring appearance or performance agreements.[192] An attorney may also be exempt if he is working closely with a licensed talent agent.[193] Aside from activities falling within this narrow exception, an attorney acting in violation of the Act's provisions could be subject to the penalties of restitution and loss of commissions.

(b) *New York*

Under New York's Theatrical Employment Agencies Law,[194] the definition of theatrical employment agency appears to be substantially similar to the definition of "talent agent" under

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the authority to regulate the Talent Agency Act, and since the Labor Commission feels that attorneys are subject to licensing under the Act, attorneys probably are subject to penalties for violating the provisions of the Act.

190. *Hearings, supra* note 28, at 197.

191. *See supra* note 189.

192. *Supra* notes 176-78 and accompanying text.

193. *Supra* note 179 and accompanying text.

194. *See* N.Y. ARTS & CULT. AFF. LAW §§ 37.01, 37.03, 37.05 (McKinney 1983) (New York law regarding "theatrical employment agencies"). Prior to 1983, the law affecting theatrical employment agents was set forth in the New York General Business Law. The transfer of location was not accompanied by any substantive changes in the law. The creation of the Arts and Cultural Affairs Law as a separate set of laws was done for policy reasons. The declaration of policy by the legislature states:

> It is hereby found that many of our citizens lack the opportunity to view, enjoy or participate in . . . the performing and fine arts generally. It is hereby further found that, with increasing leisure time, the practice and enjoyment of the arts are of increasing importance and that the general welfare of the people of the state will be promoted by giving further recognition to the arts as a vital aspect of our culture and heritage and as a valued means of expanding the scope of our educational programs. . . . [I]t is further declared that all activities undertaken by the state in carrying out this policy shall be directed toward encouraging and assisting rather than in any ways limiting the freedom of artistic expression that is essential for the well-being of the arts.

N.Y. ARTS & CULT. AFF. LAW preface (McKinney 1983).

California law.[195] There is, however, one important distinction between the New York and California laws. Unlike the California definition of "talent agent" embodied in the Talent Agency Act, the New York law states that a " '[t]heatrical employment agency' . . . does not include the business of managing such entertainments, exhibitions, or performances, or the artists or attractions constituting the same, where such business *only incidentally* involves the seeking of employment therefor."[196] Thus, when a contract is either signed in New York or deemed performed in New York, a personal manager need not be licensed as a theatrical employment agent as long as the act of seeking employment is "only incidental" to the performance of his other managerial duties.[197]

New York cases have not definitively interpreted the meaning of "incidental," but have focused on the issue of whether the personal manager is personally obligated to manage or procure employment pursuant to the terms of the contract between himself and the artist.[198] The regulation and determination of whether a personal manager's procurement violates the incidental exception is initially decided by the courts. If the court finds that the personal manager's conduct is outside the incidental exemption, the case is remanded to the New York License Commission, the equivalent of the California Labor Commission.[199] The effectiveness of New York's regulation is difficult to assess as the licensing regulation appears

195. CAL. LAB. CODE § 1700.4(a) (West Supp. 1986); *see supra* text accompanying note 44.

196. N.Y. ARTS & CULT. AFF. LAW § 37.01 (McKinney 1983) (emphasis added).

197. *E.g.*, Friedkin v. Harry Walker, Inc., 90 Misc. 2d 680, 680, 395 N.Y.S. 2d 611, 611 (N.Y. Civ. Ct. 1977) (a booking agent who secures lectures and engagements for a client who is a motion picture and theatrical personality must secure an employment agency license unless the agent is in the business of managing such clientele and the seeking of employment is only incidentally involved). *See also* Reed, *supra* note 37, at 86.

198. *See, e.g.*, Pawlauski v. Woodruff, 122 Misc. 695, 695-96, 203 N.Y.S. 819, 820 (N.Y. Sup. Ct. 1924), *aff'd*, 212 App. Div. 871, 208 N.Y.S. 912 (1925) (contract engaging plaintiff as an exclusive manager, but providing that the plaintiff is to secure engagements for defendant constituted a contract for management and only incidentally for seeking employment); Friedkin v. Harry Walker, Inc., 90 Misc. 2d 680, 680, 395 N.Y.S. 2d 611, 611 (N.Y. Civ. Ct. 1977) (the requirement of an employment agency license applies to a booking agent who secures lectures and engagements for a client who is a motion picture and theatrical personality *unless the agent is in the business of managing such a clientele* and the seeking of employment is only incidentally involved) (emphasis added).

199. *Hearings, supra* note 28, at 217.

to be only rarely enforced.[200]

An attorney acting as an agent or a personal manager who procures employment for his clients probably would fall within the "incidental" exemption specified in the New York statute. Consequently, an attorney practicing in New York would most likely not be required to obtain a theatrical employment agency license. However, an attorney practicing in both New York and California would be well-advised to acquire a license under California law, unless he is involved solely in the procurement of recording contracts.[201]

2. *Guild and Union Regulation*

The entertainment trade union or guild is a second type of regulatory body which imposes standards and rules on the attorney-agent and attorney-manager. Trade unions regulate working conditions and professional relationships in the entertainment industry by controlling the activities of their members and those who enter into employment or service agreements with their members.[202] The three unions in the entertainment industry which affect attorney-agents are the Screen Actors Guild (SAG), the American Federation of Musicians (AFM), and the American Federation of Television and Radio Artists (AFTRA).[203] These unions have authority over actors, vocalists, and musicians, who together comprise the overwhelming majority of artists serviced by personal representatives.[204]

The representative relationship that the guilds primarily regulate is that between the artist and the talent agent.[205] Each union franchises the talent agencies.[206] Without a franchise agreement from a particular union, a talent agency is precluded from procuring employment for any members of that union.[207]

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200. *Id.* at 216.

201. Thaler & Joseph, *supra* note 31, at 11-13.

202. Johnson & Lang, *supra* note 42, at 412.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Questions and Answers*, *supra* note 27, at 45.

207. A union artist who violates a union by-law by using a non-franchised talent agent can be subject to fine, suspension or expulsion from the union. This can have a serious effect on the artist because employers in a collective bargaining agreement with the union are precluded from hiring non-union members. *See* Johnson & Lang, *supra* note 42, at 412; Note, *supra* note 28, at 364-65.

Once the talent agency has acquired a franchise agreement,[208] it is subject to the duties and obligations set out in the agreement.[209] Franchisees must not engage in any business conduct other than advising, counseling, and procuring employment for artists.[210] Generally, the business conduct proscribed involves situations in which an agent could also be a potential employer of an artist.[211]

Although union regulation is primarily intended to affect talent agents, it may also affect other personal representatives. Business managers and attorneys may be subject to union regulations if they act as agents.[212] Regardless of whether one is an attorney, personal manager or business manager, if he solicits business for an artist, the unions would seek to regulate the activity.[213]

B. Regulation of Fee Practices

Personal representatives in the entertainment industry usually receive payment in the form of commissions.[214] Personal managers generally charge between ten and twenty-five percent[215] of the artist's gross receipts in addition to reimbursement for travel and other special expenses.[216] The amount that personal managers may receive in commissions is not directly

208. An agent must make an application to the national office. Once the applicant shows proof of a talent agency or employment agency license, a franchise will be granted. No fees or bonds are required and the agent will not be limited as to the area in which he may operate. *Hearings, supra* note 28, at 92.

209. Franchise agreements set out duties and obligations primarily to control compensation. *Id.* at 4. Also, they determine the duration of the agreement and preclude the agency from certain other activities. *See infra* notes 217-18 and accompanying text. The contract must state the maximum duration of the agreement as set forth by the guidelines of the specific union. *See* Johnson & Lang, *supra* note 42, at 416-18; *see also* Note, *supra* note 32, at 842-45 (detailed discussion of union regulating mechanisms and provisions). The contract must also include a termination clause which provides that if a client does not work a certain amount in a set period of time, ranging from one to five years, he may terminate the contract. *See, e.g.*, AFM by-laws, art. XXIII § 11, at 133 (rev. ed. 1981); SAG *Agency Relations*, amended Rule 16(g), § XVI-13, at 28; *see generally Hearings, supra* note 28, at 4-5; Note, *supra* note 33, at 843-44.

210. Johnson & Lang, *supra* note 42, at 417.

211. *Hearings, supra* note 28, at 19.

212. Johnson & Lang, *supra* note 42, at 413 n.195.

213. Panel Discussion, *supra* note 57 (Donald Tayer, Attorney at Law, San Francisco).

214. A "commission" is a fixed percentage, set by contract, of an artist's earnings. BLACK'S LAW DICTIONARY 246 (5th ed. 1979).

215. *Questions and Answers, supra* note 27, at 47.

216. S. SHEMEL & M. KRASILOVSKY, *supra* note 3, at 86. Under an alternative method of compensation, a manager "receive[s] payments on a net receipts computa-

regulated by any law or union regulation. Business managers usually charge between two to six percent of the gross receipts handled. Sometimes a business manager may charge a flat monthly or annual fee instead.

Although trade practices generally dictate fee ceilings, fees charged by talent agents are unique in that union regulations, and not trade practices, govern the maximum amount receivable. However, New York talent agents are subject to a statutory fee ceiling.[217] By contrast, California law sets no maximum on fees an agent may charge, but the Labor Commission has the authority to review contracts of licensed talent agents in order to ascertain whether fees are oppressive or unjust.[218] Agents' fees vary, depending mainly on the clientele of the agency: a literary agent's commission is usually ten percent, a talent agency may charge from ten to twenty percent, and an amateur play-licensing agent, twenty percent.[219] Where the agent assembles a package deal, for example in the film industry, by representing the author of a book as well as the producer, director and screenwriter, and is involved in the creation of an artistic work, his total commission could be much higher.[220]

Fee ceilings for talent agents in the movie and recording industries are imposed by the various entertainment unions.[221] Generally, an agent can charge up to ten percent for general services rendered and up to twenty percent for a single night engagement.[222] The unions proscribe double commissions, by decreeing that the maximum commission allowed is the total amount payable collectively to any and all persons functioning as a talent agent.[223] While the unions recognize that an artist may have other advisors who are entitled to compensation, the

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tion rather than gross receipts. Such arrangements will often be at a higher percentage rate while sometimes resulting in a lesser cash expense to the artist." *Id.*

217. N.Y. GEN. BUS. LAW 185 (McKinney 1968).

218. *Hearings, supra* note 28, at 197 ("Anything over 25 percent will hold that it is probably oppressive and unjust.").

219. 3 A. LINDEY, *supra* note 49, at 1738.

220. *Id.*

221. *See, e.g.*, AFTRA REGULATIONS GOVERNING AGENTS, Rule 12-B, § XX, at 21-22. *See also* Gardner & Gelfond, *Talent Agencies*, in THE MUSICIANS MANUAL: A PRACTICAL CAREER GUIDE 97, 98 (M. Halloran ed. 1979); *Hearings, supra* note 28, at 127.

222. *Hearings, supra* note 28, at 127.

223. Johnson & Lang, *supra* note 42, at 414.

guilds only regulate those procuring employment.[224] Even if the agent does not actually solicit a particular engagement, where the agent had obtained the exclusive right of representing the artist he will usually be entitled to the commission.[225]

Attorneys' fees in the entertainment industry vary. There are essentially six methods of payment: (1) hourly rate billing;[226] (2) monthly or annual retainers;[227] (3) flat fees for specific services rendered;[228] (4) a percentage basis of the artist's contract;[229] (5) a percentage (usually five percent) of the artist's income;[230] and (6) where the lawyer and client enter a partnership, a percentage of all monies arising from the partnership.[231] Additional fees may be charged for extraordinary expenses such as travel and litigation.[232]

It must be noted that use of the "percentage of total income" or "partnership" fee arrangement may place the attorney in violation of the Code provision which proscribes the charging of exorbitant fees.[233] The courts have the power to examine any contractual fee arrangement to check for fairness in light of the services rendered.[234]

In California, if an attorney enters into a business transaction with a client, a presumption of undue influence arises.[235] If the fee arrangement is disputed, the attorney has the burden of showing that the transaction was fair, that the terms were in writing, that the amount was reasonable, and that the client entered into the arrangement freely after consultation with independent counsel.[236]

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224. *Hearings, supra* note 28, at 127.

225. *See* S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 86; *Hearings, supra* note 28, at 71.

226. S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 79. *See also* Panel Discussion, *supra* note 57 (Donald Engel).

227. S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 86.

228. Halloran, *supra* note 76, at 129.

229. *Id.*

230. Panel Discussion, *supra* note 57 (Donald Engel).

231. *Id.*

232. Johnson, *supra* note 21, at 81. *See also* Halloran, *supra* note 76, at 129.

233. DR 2-106(A), *supra* note 87. *See also* Note, *supra* note 74, at 822.

234. *See* Fein v. Schwartz, 404 S.W.2d 210, 223 (Mo. 1966) ("[In light of] the nature and scope of the negotiations reflected by the record in this case. . .we find that the contract was fair when entered into,. . .and that the services rendered were reasonably worth the contingent fee agreed upon.").

235. CAL. CIV. CODE § 2235 (West 1985). *See also* 7 CAL JUR, *Attorneys at Law* §§ 202-06 (3d ed. 1973).

236. Fein v. Schwartz, 404 S.W.2d 210, 223 (Mo. 1966) (an attorney has the burden of proof in enforcing a contract for compensation between himself and his client).

Conflict of interest problems can also arise when attorneys and clients enter partnership arrangements. These problems come about because the attorney is no longer neutral and may neglect to police his client's interests.[237]

It should be apparent that if an artist hires several personal representatives and consequently pays forty-five to fifty-five percent of his earnings to them, the artist will be tempted to eliminate one or more representatives and thereby decrease the commissions and fees he must pay. The astute artist who recognizes that an attorney is subject to standards of reasonableness with respect to fee setting might engage an attorney to perform services which otherwise would be provided by other personal representatives.[238] Although the attorney may believe that he is entitled to additional fees for performing multiple services, the ABA's failure to recognize the attorney's dual roles suggests that all fees for services, whether legal or non-legal, will be subject to the ABA standards of reasonableness.[239]

3. *Summary of Issues Facing Attorney-Agents and Attorney-Managers*

The constraints imposed by the Code of Professional Conduct, state statutes, and guild and union regulations create numerous issues which the attorney-agent/attorney-manager must resolve in pursuing his dual occupations. First, the attorney must decide whether he will procure engagements for his artist clients. If he decides that he will be performing such services, he must apply for and receive a talent agency license.[240] He can not receive double commissions for the multiple services rendered, and possibly will not even earn commissions equivalent to those of a non-attorney representative performing the same services.[241] If his clients are union members, he must obtain a union franchise[242] and keep legal

237. Panel Discussion, *supra* note 57 (Donald Engel).

238. HALLORAN, *supra* note 76, at 129.

239. For example, in the sports industry, athletic agents usually take up to ten percent of the contract as their fee, but Leigh Steinberg, attorney-athletic agent, limits his fee to four to five percent. Carroll, *Agent to the Stars of Field and Tube*, S.F. Chron., January 9, 1985, at 22, col. 2.

240. Regarding California licensing requirements, *see supra* notes 163-64 and accompanying text. Regarding New York licensing requirements, *supra* notes 194-201 and accompanying text.

241. *See, e.g.*, Informal Op. 1497, *supra* note 103. *See also* Johnson, *supra* note 21, at 78.

242. *See supra* notes 206-10 and accompanying text.

and non-legal practices and records separate.[243] He must not initiate client contact amounting to solicitation. When clients seek his services, he must ascertain whether they are asking for legal or agent-manager services, and must consider whether his personal interests or those of other clients might interfere with his ability to render candid, loyal advice.[244] Finally, once an attorney establishes his dual practice, he must be aware of the continuing potential for conflicts of interest.

It is this latter consideration and the possibility that the attorney may breach his fiduciary duty that has attracted severe criticism of the dual occupations of the attorney-agent/attorney-manager.[245] At least one commentator believes that an attorney who takes on a dual role may be accepting employment for services that are beyond his capabilities.[246] Yet, this criticism of the attorney-agent/attorney-manager crossover is theoretically unfounded because the attorney is held to a higher fiduciary standard than that applicable to personal managers or talent agents.[247] Thus, an artist who chooses an attorney as his personal manager may have better insurance against the "numerous wolves" in the entertainment industry.[248] Furthermore, an attorney, unlike a talent agent or personal manager, is under a duty to keep communications confidential[249] and is required to recommend independent counsel if a potential conflict arises.[250]

Although the criticism of the dual occupation generally appears unfounded, there may be instances in which the critics'

243. *See supra* notes 110-13 and accompanying text.

244. *See supra* notes 116-23 and accompanying text.

245. S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 78.

> Recently, the Conference of Personal Managers East undertook a campaign against attorneys and accountants who are invading the ranks of [personal] managers. One member of the committee reviewing such complaints contends that artists are entitled to full-time managers, that the attorney accountant has a built in conflict of interest, and that managers, faced with growing competition, must "do something to protect themselves." *Id.*

246. Panel Discussion, *supra* note 57 (Donald Engel and Lionel Sobel).

247. "As our institutions [such as the entertainment industry] have become larger and more complex, so have the subtleties of conflicts of interest, the temptation to evade responsibilities, and the difficulties of perceiving clear answers in specific situations." Sommer, *Found: Fiduciary Duties — The Search for Content*, 9 LOY. U. CHI. L.J. 525 (1977-1978). *See generally* Jossen, *supra* note 4.

248. Johnson, *supra* note 21, at 81.

249. MODEL RULES, *supra* note 16, Rule 1.6; CODE, *supra* note 16, Canon 4; Halloran, *supra* note 76, at 130.

250. MODEL RULES, *supra* note 16, Rules 1.7-.9; CODE, *supra* note 16, DR 5-101; S. SHEMEL & W. KRASILOVSKY, *supra* note 3, at 92.

fears are valid. To the extent attorney discipline is based on client complaints—which rarely occur[251]—attorneys may be allowed to breach the fiduciary duty owed to artist-clients without being penalized. Thus, some regulatory change in this area may be warranted.

V
Avoiding and Alleviating the Dual Occupation Hazards

There are numerous difficulties facing an attorney with a secondary occupation as a personal manager, talent agent, or entertainment entrepreneur. It is evident that an attorney's allowable conduct is narrowly defined primarily due to the conflict between the high fiduciary standards required by the ABA and the general standards of conduct prevalent in the entertainment industry. In many instances a talent agent or personal manager may conduct his business using practices that would place an attorney in violation of both his fiduciary duty and specific rules under the Code.[252]

The client-protecting intentions of the ABA regulations have interfered with the ability of attorneys to practice secondary occupations. For attorneys to function effectively in the entertainment industry, changes are needed in order to better balance the interests of attorneys and clients. This note proposes three areas of possible change: the attorney's methods of practice; the state and union methods of regulation of attorney-agents and attorney-managers; and the ABA's regulation of attorneys conducting a secondary occupation.

A. The Attorney's Methods of Practice

If no changes are forthcoming in the regulation of attorneys in secondary occupations, several courses of action are available to entertainment attorneys to minimize the legal and ethical hazards of acting in various capacities.

1. *Never exceed the role as legal counsel for an artist.*

Pursuing this course of action requires the attorney to avoid

251. For a thorough discussion of the California State Bar Association discipline mechanism, *see* Kang & Finefrock, *The Brotherhood: Justice For Lawyers*, S.F. Examiner, March 25, 1985, at A1, col. 1.

252. *See* Jossen, *supra* note 4, at 117-19.

the following practices: (1) entering into the personal management of an artist; (2) soliciting employment; and (3) acquiring a monetary interest in any financial venture that could undermine the attorney's role as neutral legal advisor. These limitations on attorney behavior will ensure that the client receives adequate and objective representation, and provide the attorney with an adequate opportunity to oversee the other personal representatives, stay current in his field and protect his client's interests. There are, of course, difficulties inherent in this course of action. Drawing the line between legal representation and client counseling in other non-legal matters is often difficult.[253] Also, an attorney may have to sacrifice the increased economic gains he could acquire by performing multiple representative functions.[254]

2. *Take on only one role for each artist, and keep the artist informed as to which "hat" is being worn.*

Even if an attorney acts as a talent agent or personal manager for his clients, he can avoid possible conflicts of interest and accusations of solicitation or improper appearance by clearly separating the functions he performs for the artist. Under this course of action, an attorney can conduct his practice of law and his secondary occupation at the same time by following the rules and regulations pertinent to each profession. However, even if the attorney never operates as legal advisor for a client, the Code states that the attorney should avoid solicitation of business[255] and charge only reasonable fees.[256] Furthermore, the attorney must be careful to recommend independent counsel should the client need legal assistance.

3. *Be cautious, be wary, and follow the rules.*

An attorney who wants to perform multiple functions for an artist, and believes that the ABA's lack of self-initiated investigation will render his practice immune from close supervision,[257] will probably act as he wishes. However, the prudent

253. *See supra* notes 66-67 and accompanying text.

254. *See supra* notes 139-41 and accompanying text (attorneys limited to charging reasonable fees); *supra* notes 214-39 and accompanying text (standard fees for the different personal representative functions).

255. *See supra* note 135; DR 2-103, *supra* note 87.

256. *See supra* notes 139-41 and accompanying text.

257. *See supra* notes 142-53 and accompanying text.

attorney who wishes to protect his own interest should be licensed as a talent agent, especially in California. If he plans to procure engagements for an artist, he should be franchised by the applicable unions.[258] Above all, the attorney should keep his clients happy and satisfied since bar and state agency policing is, for the most part, based on client complaints,[259] and clients generally do not take their attorneys, managers and agents to court unless they are dissatisfied with the services they are receiving.

The drawbacks of inattention to the applicable rules should be obvious. By ignoring the well-intentioned, albeit overly restrictive, protective governance of the state legislatures and bar associations, the attorney is abandoning the obligations he assumed on entering the legal profession. The attorney will be considered to be in breach of his duty to uphold the purposes of the bench and bar. The legal system is premised on individual maintenance of integrity and improving the competence of the bar. Meeting these standards is considered to be the ethical responsibility of every lawyer.[260]

B. Change the Rules Governing the Secondary Occupation Industry

As currently drafted, the rules and regulations governing the various types of personal representatives impose inconsistent standards. These differences create conflict among an artist's various representatives, rather than encouraging adequate protection of artists' interests. Changes in the rules governing an attorney's secondary occupation would thus enhance the attorney's ability to function effectively in the entertainment industry.

1. *Enact uniform legislation imposing fiduciary standards on all artists' personal representatives.*

Many of the conflicts facing attorneys acting in dual capacities stem from the fact that attorneys are held to a fiduciary duty which exceeds that required of talent agents and personal

258. *See supra* text accompanying notes 45-46, 202 and accompanying text (New York); notes 163-64 and accompanying text (California); notes 206-11 (franchising requirement).

259. *See supra* note 146 and accompanying text; *see also* Kang & Finefrock, *supra* note 251.

260. CODE, *supra* note 16, EC 1-1, 1-5.

managers.[261] One solution to this inconsistency would be to identify and define a common fiduciary standard applicable to all personal representatives. "This standard should be promulgated with the primary purpose of protecting the artist."[262] The standard enacted should be similar to the current fiduciary duty required of attorneys. By synthesizing the standards of required conduct for talent agents and those of attorney-client relationships, additional laws "could be written which would prevent overreaching contracts, unfair business practices and conflict relationships between personal managers and artists,"[263] or talent agents and artists. By extending such a standard to all personal representatives, it is possible that all "loopholes" could be filled, creating uniform standards sufficient to protect any artist regardless of his choice of specialist.[264]

2. *License personal managers and specifically delineate the separate roles of personal representatives.*

Part of the problem facing personal representatives is that the exact functions of each representative are not clear, and services rendered to artists overlap. Requiring that personal managers be licensed under a licensing scheme which expressly describes the different tasks of talent agents and personal managers could eliminate the overlap. This would provide clearer guidelines for each representative to follow. Numerous individuals in the entertainment industry have proposed a licensing scheme for personal managers.[265] This suggestion has been constantly criticized by personal managers[266] who seem to believe that licensing of both talent agents and personal managers would create a duplication of duties and overreaching regulation.[267] However, since most of the criticism comes from the managers themselves, it may actually stem from the desire to perform representative functions without the burden of acquiring a license. If the concern with duplication and overreaching is meritorious, specific delineation of duties would ameliorate duplication. On balance, as this commentary has illustrated,

261. *See generally* Jossen, *supra* note 4.
262. *Id.* at 120.
263. *Id.*
264. *Id.*
265. Note, *supra* note 28, at 363; *see also generally Hearings*, *supra* note 28.
266. *See generally Hearings*, *supra* note 28.
267. *Id.*

regulation and guidance in this area is necessary, rather than overreaching.

3. *Create an incidental booking exemption for California attorneys.*

In New York, the Theatrical Employment Agencies law excludes from regulation those individuals who only incidentally procure employment for artists.[268] If California were to enact similar legislation attorneys could operate in the entertainment industry without being encumbered by having to acquire an additional license if they are only involved incidentally in acquiring employment for their clients as part of contract negotiations. Such an exception already exists for California attorneys under the California Athlete Agents Act.[269] This exception reflects the acknowledgement by the sports industry and the California legislature that attorneys are already held to a higher fiduciary duty than agents, and that licensing is therefore a duplication of existing regulation.[270]

4. *Exempt attorneys from the guild franchising provisions.*

The regulation of the personal manager-lawyer by guilds is extremely rigid and provides unnecessary protection. This results from the primary entertainment unions' vigorous protection of their artist-members.[271] Since an attorney already has a well-defined fiduciary duty,[272] he is already mandated to protect his clients' interests. Therefore, an exemption from formal franchising for an attorney-agent should not be viewed as inconsistent with the entertainment unions' protective function. Also, since an attorney is required to keep his or her fees reasonable,[273] any union fear of exorbitant fees is most likely unfounded.[274]

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268. *See supra* notes 196-200 and accompanying text.

269. CAL. LAB. CODE § 1500(b) (West Supp. 1984) (stating that " 'athlete agency' does not include any member of the State Bar of California when acting as legal counsel for any person").

270. *See supra* note 117, at 1018.

271. *Id. See also* Johnson & Lang, *supra* note 42, at 412.

272. *See generally* Levy & Sprague, *supra* note 29; Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804 (1982).

273. *See supra* notes 139-41 and accompanying text. Even though the ABA rarely enforces most disciplinary rules, it does enforce rules involving fees, since clients are more apt to complain about their pocketbooks than about other violations.

274. Union regulation of fees via franchising of personal representatives seems to

5. *Require uniform fee provisions for agents, managers and attorneys operating as personal representative for an artist.*

New York and many guilds already designate fee ceilings for talent agents.[275] Standards should be set for personal managers as well. In addition, provisions should be established to account for the added services a personal representative may be performing if he operates in more than one capacity.[276] Although this latter change might not be of substantial benefit for an attorney since he would still be held to a standard of reasonableness with respect to fee setting,[277] it may enable him to argue that the trade practice justifies the fees charged.[278]

C. Change the ABA Rules Governing the Attorney

The most restrictive regulations affecting attorneys seeking to engage in multiple occupations are promulgated by the ABA. The Code of Professional Responsibility is adverse to dual occupations.[279] The ABA's failure to recognize the increasing occurrence of dual professions causes unnecessary encumbrances for an attorney-agent and an attorney-manager. This could be remedied in two ways.

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be rather inconsistent. Since the only representative subject to the franchise requirement is the talent agent and not the personal manager (who charges far more for his services) it is questionable whether a fear of "exorbitant fees" is the true reason for franchising. *See supra* notes 206-11 and accompanying text.

275. *See supra* notes 214-39 and accompanying text.

276. This could be done similarly to the AFM " 'personal management agreement' [whereby] . . . [a] talent agent franchisee-personal manager may receive an additional five percent [above the usual ten to twenty percent] of the gross income earned by the musician if the talent agent franchisee-personal manager agrees to also advise and counsel the artist in various areas." Johnson & Lang, *supra* note 42, at 415. Perhaps such a uniform fee schedule could provide for a base of fifteen percent of gross income for providing a sole service (e.g. talent agent), with additional increments of five percent for each additional service performed. For example, a representative performing talent agent, personal management and legal service would receive a total of twenty-five percent of an artist's gross income.

277. *See supra* notes 87, 142-44 and accompanying text.

278. DR 2-106, *supra* note 87, states that one of the factors to be considered as a guide for determining the reasonableness of a fee is "[t]he fee customarily charged in the locality for similar legal services." DR 2-106(B)(3), *supra* note 87.

279. *See supra* notes 88-91 and accompanying text.

1. *Explicit recognition of secondary occupations with a possible change in the standard for the secondary occupation.*

The professional responsibility rules currently dictate that an attorney must conduct all legally related and non-related[280] business under directives governing attorney conduct. By explicitly recognizing that an attorney may engage in a secondary occupation, and exempting an attorney from ABA rules in the practice of that occupation, the attorney would be able to practice his non-legal functions more freely. Thus, the attorney-agent and attorney-manager would only have to follow state and guild regulations while he acts as a non-legal personal representative.

2. *Relax specific prohibitions that restrict the manner of practice.*

If certain prohibitions regarding attorney conduct were relaxed, the high standards imposed on an attorney in his secondary occupation could be maintained while still allowing the attorney some flexibility in his practice as an agent or manager. This would resemble an incidental exemption as to specific non-legal conduct. For example, if the ABA were to relax its prohibitions against solicitation, the lawyer-agent could compete for clients with non-attorney agents.[281] These prohibitions could be eased by changing the emphasis on attorney practice from a transactional focus to a client focus by allowing an attorney to perform all of the services a given client would need. It is illogical to force an attorney to turn away clients from his legal practice merely because they first learned of his expertise through his other services.[282] If the attorney has established a professional relationship with an artist and understands the artist's dealings within the entertainment industry, it is possible that the level of knowledge attained from that relationship could enhance the legal services provided.

280. *See supra* notes 88-89 & 107 and accompanying text.

281. This suggestion was proffered in Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815, 842, as "[a] promising solution to the problems [of solicitation] created by dishonest and incompetent agents [that would] allow lawyer-agents to compete for clients with non-lawyer agents."

282. DR 2-104(A), *supra* note 87.

VI
Conclusion

The attorney operating in a secondary occupation has been virtually ignored by the ABA. As a result, none of the regulations, rules, or laws governing attorney conduct attempt to accommodate dual occupation arrangements. Such an accommodation may benefit the general public and artists, who depend on the loyalty and protection offered by a personal representative in an otherwise confusing and complex work place. This commentary recognizes that by entering into the legal profession, an attorney willingly accepts the ABA guidelines which define his practice. Historically, the ethical considerations imposed on attorneys have helped make the legal profession the unique and respected profession it is. However, the time has come when traditional practices need to become more flexible.

In view of both the value and the dangers inherent in engaging in a secondary occupation, this commentary proposes changes to alleviate the potential conflicts faced by the attorney-manager.[283] Such changes are necessary if attorneys in the entertainment industry are to contribute their full range of skills and services to the business.

As the entertainment industry exists today, standards for the various representatives often conflict[284] and enforcement of the regulations is minimal.[285] Imposing a uniform fiduciary duty on any personal representative[286] combined with an explicit recognition of secondary occupations by the ABA[287] should be the first step towards change. These proposals may be seen as far reaching and may be the most difficult to implement. However, they would be the most beneficial solutions because they focus directly on the needs of artists and attorneys. The proposals would easily create the change needed by attorneys who practice in dual occupations, while maintaining necessary artist protection. These proposals are eventually a compromise between existing practices. By raising the fiduciary standard of personal managers and reducing the restrictions faced by attor-

283. *See supra* text accompanying notes 252-82.

284. *See supra* notes 240-50 and accompanying text.

285. *See supra* notes 142-51 and accompanying text. *See also* notes 180-90 and accompanying text.

286. *See supra* text accompanying notes 261-64.

287. *See supra* text accompanying note 280.

neys, parity could be reached, with all representatives owing a similar fiduciary duty to the artist.[288]

Once these proposed standards are enacted, many of the other suggestions could be easily adopted. For example, any legislation mandating a fiduciary duty could clarify the "gray areas" by delineating the specific functions of each representative.[289] The next logical step would be to enact uniform fee provisions,[290] relax specific prohibitions for attorneys,[291] and restructure union franchising provisions.[292]

Successful implementation of these changes will require the concerted effort of all interested parties within the entertainment industry, legislature and bar. If change is not forthcoming, attorneys may choose to ignore regulations, and base decisions regarding artist representation on convenience and fear of client dissatisfaction, rather than on client protection. To avoid this scenario, the dual occupation of attorney-manager and attorney-agent should be recognized and closely examined by the ABA, the legislature and pertinent entertainment industry entities.

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288. Johnson & Lang, *supra* note 42, at 425 n.237 ("Personal managers should be held to the same standard as agents or trustees."); *but cf.* Jossen, *supra* note 4, at 117 (the author feels that holding personal managers to the standard of an agent is "inadequate for sufficient protection of artists' interests [and is] . . . inequitable since attorneys are held to a higher fiduciary duty than agents. . . ."). It appears that Jossen is using the generic term of agent, rather than talent agents as set out in the Labor Code, CAL. LAB. CODE § 1700.4 (West Supp. 1986). If new legislation is enacted to prescribe a fiduciary duty for all personal representatives, the degree of such duty could also be prescribed.

289. *See supra* text accompanying notes 265-67.

290. *See supra* text accompanying notes 275-78

291. *See supra* text accompanying notes 281-82.

292. *See supra* text accompanying notes 271-74. The suggestion discussed at text accompanying notes 271-74, *supra*, focused on an exemption from franchising for attorneys. If legislation were enacted mandating a uniform fiduciary duty regulating all personal representatives, the unions might want to reexamine their entire franchising provisions to reevaluate who should be franchised and how that should be accomplished.